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In the Supreme Court of the United States

OCTOBER TERM, 1962.

THE ERIE STONE COMPANY, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. 388
TOLEDO STONE & GLASS SAND COMPANY, Petitioner, vs. UNITED STATES OF AMERICA, Respondent.	No. ----------

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit.

Ross W. Shumaker,
811 Madison Avenue,
Toledo 2, Ohio,
Counsel for Petitioners.

John J. Kendrick,
Carl V. Bruggeman,
Shumaker, Loop & Kendrick,
811 Madison Avenue,
Toledo 2, Ohio,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals. For the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Erie Stone Company and Toledo Stone & Glass Sand Company, your petitioners, pray that a writ of certiorari issue to review the judgments by a divided court of the United States Court of Appeals for the Sixth Circuit entered in these cases which involve identical facts and questions of law, and hence were consolidated for purpose of trial and appeal in the courts below (R. 33a, A-52).[1]

OPINIONS BELOW.

Each of the three judges of the Court of Appeals wrote an opinion, the principal opinion, although representing the minority view on the chief issue in the cases, being that

[1] "R" refers to the printed Appendix to appellants' brief below, nine copies of which are on file herein; "A-" refers to the Appendices to this Petition for a Writ of Certiorari.

of Judge McAllister (A-10-50). These three opinions are not yet officially reported but appear in full in 9 AFTR 2d 1543. The opinion of the District Court for the Northern District of Ohio, Western Division (R. 373a-381a), is reported at 181 F. Supp. 942.

JURISDICTION.

The judgments of the Court of Appeals were entered on June 4, 1962 (A-8-9). A timely petition for rehearing and reconsideration filed by petitioners was denied on August 7, 1962 (A-51). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. These cases involve the proper interpretation of an important federal taxing statute: whether the Congress of the United States, by the 1951 Amendment to the Internal Revenue Code of 1939 (26 U. S. C. 114 (b)(4)(A), 1952 ed.; 65 Stat. 497), relating to percentage depletion for non-metallic minerals, intended to and did by the words and terms of the Amendment extend percentage depletion at the rate of 15% to "dolomite" of high grade, suitable and capable of use for metallurgical and chemical purposes; or, stated more specifically, whether the Congress meant to and did by the language of the Amendment include for depletion purposes "dolomite" of metallurgical or chemical grade within the statutory terms "metallurgical grade limestone, chemical grade limestone." The question is one of great public interest in the administration of the statute and has not been decided by this Court, pp. 17-20, *infra*.

2. The cases also involve a related question: whether a majority of the Court below misapplied the law in holding that decision was controlled by the "not clearly er-

roneous" principle embodied in Rule 52(a) of the Federal Rules of Civil Procedure, instead of by the application of the statutory language, properly construed, to the ultimate determinative facts which were admitted or not in dispute in the District Court.

The order of the Court below denying the petition for rehearing (A-51) clearly and correctly states the questions involved as follows:

> "* * * ORDERED that the petition for rehearing be, and is hereby denied on the ground that the findings of fact of the district court that the dolomite in question is not limestone of chemical and metallurgical grade were supported by the evidence. Judge McAllister is of the opinion that the petition for rehearing should be granted on the ground that, while both parties agree that the dolomitic product is dolomite, the case should be determined on the issue whether it was the intention of Congress that dolomite of chemical and metallurgical grade should be classified in the same category for depletion purposes as limestone of chemical and metallurgical grade."

Subsidiary questions are: whether the statute in respect of its listing of numerous mineral terms in three distinct classifications—with varying rates of percentage depletion assigned to each class—is ambiguous in that the listed mineral terms are not mutually exclusive but frequently overlap, with general terms in one category including more specific terms in another[2]; and whether and

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[2] For example, the term "stone" in the first bracket of the statute includes "calcium carbonates," "magnesium carbonates" and "dolomite," classified in the second bracket, and "limestone" which term, unmodified, does not appear in the statute at all; and these terms, in turn, include "metallurgical grade limestone, chemical grade limestone" listed in the third bracket of the statute (R. 121a-131a, A-14) and "metallurgical and chemical grade dolomite" which, like "limestone," is not specifically enumerated in the statute in any group.

to what extent, because of this patent ambiguity, resort may be had to the legislative history to detect the meaning of the statutory language, and the intent and purpose of the Congress in adopting the Amendment.

WHAT THE COURTS BELOW HELD.

The District Court held that taxpayers' mineral deposits were dolomite and hence only entitled to a 10% rate of depletion, regardless of their grade or quality or their suitability for metallurgical or chemical purposes. Two of the judges of the Court of Appeals accepted the District Court's findings and wrote short opinions of affirmance (A-47-50). Judge McAllister, however, in a lengthy opinion vigorously disagreed with the majority and held that upon the record and a proper construction of the statute, taxpayers' deposits were classifiable for depletion purposes as metallurgical or chemical grade limestone entitled to a 15% rate of depletion.[3] (A-10, 47). These differences of view of the Court were carried into the ruling on the petition for rehearing (A-51).

THE STATUTE AND REGULATIONS INVOLVED.

The statute in pertinent part (26 U. S. C. 114 (b)(4)(A), 1952 ed.; 65 Stat. 497) is set forth in the Appendix (A-1-2). It provides at varying rates for percentage depletion on the gross income derived from the sale of nonmetallic minerals listed in three separate categories. The

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[3] Upon a minor issue with respect to the rate of depletion applicable to No. 63 Limestone, Judge Weick joined with Judge McAllister in reversing the District Court, over the dissent of Chief Judge Miller. The District Court had allowed this material as "stone" a 5% rate of depletion; the majority of the Court of Appeals held it was entitled as "dolomite" to a 10% rate.

listing of the mineral substances relevant in these cases is as follows:

> "(i) * * * stone * * * 5 per centum.
>
> "(ii) * * * dolomite * * * calcium carbonates and magnesium carbonates, 10 per centum.
>
> "(iii) * * * metallurgical grade limestone, chemical grade limestone * * * 15 per centum"

The Treasury Regulations in existence are amendments of earlier regulations (Treas. Reg. 118, Sec. 39.23 (m)-5, C. B. 1960-2, 458-460) and are in pertinent part set forth in Appendix B (A-3-5). These amendments, however, were not approved until November 29, 1960, some nine years after the amended statute was enacted, and six years after the amended 1939 Code had been superseded by the Internal Revenue Code of 1954 (26 U. S. C. 613).

The first regulations announced by the Commissioner under the 1951 Amendment of the statute were adopted in July 1953 (T. D. 6031, C. B. 1953-2, 120), and prescribed an end-use test for determining the rate of precentage depletion, since partially abandoned by the Commissioner (Rev. Rul. 55-700, C. B. 1955-2, 569; Rev. Rul. 56-582, C. B. 1956-2, 981; and Rev. Rul. 57-288, C. B. 1957-1, 518), after the courts had declared the end-use test illegal. *Virginian Limestone Corp. v. Commissioner*, 26 T. C. 553 (1956); *Wagner Quarries Co. v. United States*, 154 F. Supp. 655 (D. C. N. D. Ohio 1957), aff'd on other issues 260 F. 2d 907 (6 Cir. 1958).

The present regulations as amended, although they attempt to define certain relevant terms used in the 1951 Amendment to the 1939 Code here involved, will not be discussed in this petition because they were not published

contemporaneously with or shortly after the enactment of the statute, and do not reflect a continuity or uniformity of administrative interpretation by the Commissioner, but instead a departure from the prior administrative interpretation. *Merritt v. Cameron*, 137 U. S. 542, 551-2 (1890); *Burnet, Comm'r v. Chicago Portrait Co.*, 285 U. S. 1, 16 (1932); *United States, et al. v. American Trucking Associations, Inc.*, 310 U. S. 534, 544 (1940), rehear. den. 311 U. S. 724 (1940). Indeed, they were belatedly adopted only after the statutory terms had become involved in much litigation about the nation, including the instant cases.[4]

STATEMENT OF THE CASES.

The determinative facts are admitted or not in substantial dispute and are correctly set forth in the opinion of Judge McAllister in the Court below (A-11-39).

The taxpayers in the relevant years (1951-1953, inc.) were owners and operators of limestone rock quarries, The Erie Stone Company having quarries at Bluffton and Huntington, Indiana. The quarry of Toledo Stone & Glass Sand Company was at Silica, Ohio. All three quarries were of the open pit type and the operations consisted of stripping the overburden, drilling, blasting, loading, hauling, crushing, screening, scrubbing, storing and marketing (R. 85a-86a).

These quarries, although producing the type of limestone sometimes called dolomite or dolomitic limestone, were commonly known and considered as limestone quar-

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[4] The Government in the appeals below, although listing the amended Regulations in an Appendix to its brief, did not claim they were controlling on the Court or, indeed, entitled to any weight in construing the statute.

ries. The limestone from all faces of the quarries was commingled and there was no selective mining.

Without question the deposits of the taxpayers were of high grade and of excellent quality. Chemical tests and analyses made by Pittsburgh Testing Laboratory of samples taken from the quarries by the Government and by the taxpayers, as well as tests of the deposits conducted over a period of years by Dr. Herbert F. Kriege, an outstanding expert in the limestone field, averaged out as follows (R. 334a-338a, 356a, 358a-361a, 364a-373a, and exhibits there cited):

Calcium Carbonates	Magnesium Carbonates	Total Carbonates	Impurities	Neutralizing Power
54.20%	43.40%	97.60%	2.40%	104.60%

The high chemical quality of the stone deposits of the taxpayers, as shown by the foregoing table, was in no way questioned in the Courts below and was not the subject of any dispute whatever.

The Government, however, claimed that the chemical analyses clearly showed that the deposits were "dolomite" and that being true, the deposits for depletion purposes fell within the second category of the statute, taking a 10% rate of depletion. The Government asserted that no other factors or considerations were material, such as suitability of the product for metallurgical or chemical purposes (R. 77a, 79a, 80a), "or whether it is considered also a metallurgical grade limestone", and, the Government contended, "dolomite is the more specific designation since *it is a part of limestones in general*" (R. 215a-216a). (Emphasis supplied.)

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[5] A type of limestone mined in small quantities at the Huntington quarry of The Erie Stone Company, known as No. 63 Limestone, which received discussion in the opinions of the Courts below, is not involved or considered in any respect in this petition.

On the contrary, the taxpayers contend that their deposits fell within all three categories of the statute, that is, they were at the same time stone, dolomite and metallurgical or chemical grade limestone; that dolomite in customary usage in industry is a kind of limestone—as the Government admitted "a part of limestones in general"; that metallurgical and chemical grade dolomite is included within the statutory terms "metallurgical grade limestone, chemical grade limestone"; that the terms "metallurgical grade limestone, chemical grade limestone" are more specific than the term "dolomite" because they denote a particular kind of limestone of special quality and use, whereas the latter term is unmodified and may apply to any grade of dolomite or dolomitic limestone, high or low and without regard to quality or use; that the terms "metallurgical grade limestone, chemical grade limestone" most specifically describe and designate taxpayers' deposits; and that hence for depletion purposes their deposits must be classified in the third category of the statute and allowed a 15% rate of depletion.

Taxpayers' deposits were not the pure mineral dolomite which would contain 54.27% of calcium carbonate, 45.73% of magnesium carbonate and no impurities, and which is not a commercial item (R. 124a, 125a; Txps. Ex. 66, 355a). But taxpayers admit their deposits were the *rock* dolomite, or dolomitic limestone,[6] containing the mineral dolomite in varying percentages, and that Congress used the term "dolomite" in the statute in the sense of the "rock" and not the "mineral". But they further point out that because their deposits were conceded to be

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[6] Dolomite is also known and frequently described as dolomitic limestone or magnesian limestone (R. 272a), and these terms are often used interchangeably to designate the same product. (A-20-21, 39.)

of high grade and quality, and suitable for metallurgical and chemical purposes, they were classifiable for depletion purposes in the third category of the statute, since Congress clearly indicated in the legislative history (Conf. Rep. No. 1213, to accompany H. R. 4473, 82d Cong., 1st Sess. 77, 2 U. S. Code, Cong. and Adm'n Serv., 82d Cong., 1st Sess. 2133) that:

> "* * * in any case where a mineral is specifically provided for at a stated rate of percentage allowance, that the specific provision will govern over the allowance provided (whether higher or lower) for a more general classification."

The decisive facts in these cases were four in number and not in dispute. Hence, Rule 52(a), Fed. Rules Civ. Proc., was without application and should not have guided the majority of the Court of Appeals to decision.[7]

First, were taxpayers' deposits "dolomite"? As we have already indicated, taxpayers admitted their deposits were the rock "dolomite", or dolomitic limestone. In their brief below (p. 10), they stated "Although taxpayers' product was not the mineral dolomite, it was admittedly a very high grade kind of limestone known as the rock dolomite, or dolomitic limestone," and in the same brief (p. 34) clearly set forth their position as follows:

> "Applied to the cases at bar, the product of the taxpayers is stone and would, therefore, fall within the first category of the statute; it is also compre-

[7] The Government did not claim in the Court below that the cases should be decided on the basis of Rule 52(a). On the contrary, the Government has maintained throughout that the decisive question is one of law. At the outset of the trial, government counsel stated (R. 77a): "The actual problem the Court has, as the government sees it, is primarily a legal problem rather than a factual problem. It must determine the meaning of the terms as used by Congress in the statute."

> hended by the terms 'magnesium carbonates', 'calcium carbonates' and 'dolomite' and would, therefore, fall within the second classification of the statute; but if the product is also metallurgical grade limestone or chemical grade limestone, as the taxpayers contend, then it would also fall within the third classification of the statute."

Thus, this fact was not in dispute, it was admitted; and the finding of the District Court on this point was of no significance and in no sense determinative of the real issue before the Court, which is hereinafter considered.

After a comprehensive and analytical review of the evidence, Judge McAllister in the Court below concluded on this subject as follows (A-41-42):

> "I am of the view that, in conformity with the foregoing, in the instant case, taxpayers' product was not only 'stone' within the first category of the statute, and 'dolomite' within the second classification, but it was also 'metallurgical or chemical grade limestone' within the third bracket of the statute, which was qualitatively adaptable to higher uses and, hence, entitled to the depletion allowance at the rate of 15%."

Second, were taxpayers' deposits, in addition to being the rock "dolomite", *also* "metallurgical grade limestone, chemical grade limestone"? On this issue, the District Court made a negative finding of fact (R. 399a) and conclusion of law (R. 401a). But the finding of fact has *no* support in the record. Not a single witness called by the Government or taxpayers or exhibit offered by them supported the finding, but, the evidence of Dr. Herbert F. Kriege, a highly qualified and experienced witness called by taxpayers, with thirty years' knowledge of these quarries and the stone produced from them, testified that the deposits were in his opinion limestone of metallurgical

and chemical grade (R. 132a, 135a), and suitable for metallurgical and chemical purposes in the steel, lime, paper, glass and refractories industries and soil neutralization (R. 136a-140a, 178a-179a). Furthermore, the admittedly high chemical purity of the stone—its carbonate content of 97.6% and its impurity percentage of only 2.4%—is in itself strong evidence of its fitness for metallurgical and chemical purposes. Nor did the Government contest the quality and fitness of taxpayers' stone for such purposes. It contended that was an immaterial issue (R. 77a, 79a, 80a, 209a).

Without any factual foundation, the "conclusion of law" of the District Court that taxpayers' stone was not of metallurgical or chemical grade is meaningless and futile, and is contrary to the law established by the Court below in *United States v. Wagner Quarries Co.*, 260 F. 2d 907 (6 Cir. 1958), where that Court laid down a standard or legal test for determining if limestone—whether dolomitic or high calcium—is of metallurgical or chemical grade, namely, the stone must be "of high carbonate content with a very low silica or impurities percentage" and, to be sure, "suitable for metallurgical or chemical purposes". That taxpayers' stone met this legal test has not been challenged, and hence the negative fact finding and legal conclusion of the District Court on this question is unsupported by the record and by the law.

Third, were taxpayers' dolomite deposits in common usage considered to be limestone, and treated as an integral part of the limestone industry? Here again the District Court's negative answer (R. 399a) is not supported by evidence, but is opposed to it. Dictionaries, encyclopedias and treatises uniformly define dolomite in terms of limestone and as included within the broader term "lime-

stones";[8] departments of the Government have so defined and treated it;[9] and the Commissioner of Internal Revenue in official rulings has consistently defined dolomite as limestone (Rev. Rul. 57-288, C. B. 1957-1, 518), as metallurgical grade limestone (Rev. Rul. 55-700, C. B. 1955-2, 569) and as chemical grade limestone (Rev. Rul. 56-582, C. B. 1956-2, 981).

The Court of Claims in *H. Frazier Company v. United States*, 302 F. 2d 521, 525 (Ct. Cl. 1962) correctly pointed out that "Any rock consisting of at least 50 percent calcium carbonate"—as is true of the deposits of petitioners herein—"may be properly termed limestone". And, see the opinion of Judge McAllister in the Court below (A-16-26) where the record is reviewed and the subject is considered at length.

Furthermore, in seeking to determine the intent of Congress, the sources of information open to the Committees of Congress who formulated the statute are of great importance. The principal witness before the Committees of the Congress was Dr. Kenneth K. Landes, at one time head of the Department of Geology of the University of Michigan. He testified before both the Ways and Means Committee of the House and the Finance

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[8] See, for example, *Webster's New International Dictionary of the English Language* (2d ed. 1950) Unabridged; *Webster's New World Dictionary of the American Language*, College ed., 1953; *Encyclopedia Britannica*, 1956 ed.; 1955 *Book of Standards of The American Society for Testing Materials*, Part 3, p. 1140; *Dictionary of Geological Terms* (1945); *A Handbook of Rocks*, p. 173, by James Furman Kemp (1940); *Guide to the Study of Rocks*, p. 178, by L. E. Spock, (1953); *The Stone Industries*, p. 377, by Oliver Bowles, (1939).

[9] *Glossary of the Mining and Mineral Industry*, by Albert H. Fay, U. S. Dept. of the Interior, Bureau of Mines (1947) Bulletin 95, p, 225; *Limestone and Dolomite*, by Oliver Bowles, Information Circular 7738 Bureau of Mines, U. S. Dept. of the Interior, March 1956; *Liming Soils for Better Farming*, Farmers' Bulletin No. 2032, U. S. Dept. of Agriculture (R. 350a, Txps. Ex. 57).

Committee of the Senate, and his comprehensive paper "Metallurgical Limestone Reserves in the United States" was made a part of the records of both Committees (R. 339a-345a, Txps. Ex. 54). Dr. Landes is generally given credit for coining the terms "metallurgical grade limestone, chemical grade limestone", *Wagner Quarries Co. v. United States*, 154 F. Supp. 655, 660 (D. C. N. D. Ohio 1957) (A-23), and was considered by the Government as the most influential witness appearing before the Committees and whose evidence was highly persuasive with the Committees in framing the legislation (A-24).

As Judge McAllister of the Court below pointed out in his opinion, Dr. Landes in his testimony and paper emphasized the importance of limestone, both dolomitic and high calcium, in our economy and in national defense, and the scarce and exhaustible nature of reserves, suitable for metallurgical and chemical purposes (A-24-25, 38, 43). Dr. Landes made clear to the Committees that dolomitic limestone is used in blast furnaces as a flux in steel production (R. 203a-204a), and as a refractory in building and repairing open hearth furnaces (R. 343a). He also testified that the *dolomite* deposits in Northwestern Ohio were among the best metallurgical *limestone reserves* in the United States (R. 348a-349a, Txps. Ex. 56).

In his paper presented to the Committees, Dr. Landes treated dolomite, "as in industry," as a part of limestone, identified limestone and dolomite as the same rock material, and laid down standards for limestone, including dolomite, suitable for metallurgical and chemical purposes (R. 340a-341a, Txps. Ex. 54). In a table contained in his paper (R. 341a), he listed four types of limestone suitable for metallurgical and chemical purposes, two of which—B-1 and B-2—are dolomite of a chemical composition quite similar to that of taxpayers herein. The utilization

of the various grades of limestone—including dolomite, are shown in another table (R. 343a). This was the testimony and evidence before the Committees of the Congress that phrased this legislation, and it may safely be assumed that in listing the mineral terms in the statute, the Congress intended to give them the same meaning and scope as Dr. Landes accorded them.[10]

Finally, as bearing upon whether in common usage in the industry dolomite is considered to be included in the broader term "limestone," the industry limestone statistics invariably include dolomite without mention of that term (R. 346a, 351a); taxpayers' quarries, although producing the rock "dolomite" were commonly known and referred to as "limestone quarries" (R. 93a, 96a-97a, 161a); and it is not without significance that the name of the company which produced and sold only "dolomite" in the *Virginian Limestone* case[11] was Virginian *Limestone* Corp. not Virginian *Dolomite* Company.

Thus it appears from the record without substantial dispute that in common understanding and parlance (R. 203a), as well as in the definitional authorities (R. 201a), dolomite is considered to be included in the term limestone and the presumption is that that is the sense in which Congress used these terms in the statute.[12]

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[10] Hearings before the Committee on Ways and Means, H. Rep., 81st Cong., 2nd Sess., Feb. 9, 1950, pp. 335-348; Hearings before the Committee on Ways and Means, H. Rep., on Revenue Revision of 1951, 82d Cong., 1st Sess., March 5, 1951, pp. 1555-1566; Hearings before the Finance Committee, U. S. Sen., 82d Cong., 1st Sess., on H. R. 4473, July 12, 1951, pp. 875-884.

[11] *Virginian Limestone Corp. v. Commissioner*, 26 T. C. 553 (1956).

[12] While Congress did not define in the statute the relevant mineral terms, it did provide that "The names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning." S. Rep. No. 781, 82d Cong., 1st Sess. 38, 2 U. S. Code, Cong. & Adm'n Serv. 2008.

In the Court below Judge McAllister considered at length, in the light of the undisputed evidence and the definitional authorities, the relationship between dolomite and limestone, and concluded as follows (A-26):

> "From the foregoing, I conclude, in this case, that the term, limestone, includes dolomite; and that limestone of metallurgical and chemical grade includes dolomite of a metallurgical and chemical grade."

Fourth, which is the more specific term "dolomite" or "metallurgical grade limestone, chemical grade limestone"? [13] This was an important question of fact because of the Congressional admonition, *supra*, p. 9, that where the mineral terms are overlapping the most specific term will take the higher depletion rate.

There is *no* finding of fact on that important issue, although in Conclusion of Law No. 6 (R. 401a) appears this question-begging statement: "Dolomite is a specific designation * * *." Even this was contrary to the evidence which clearly showed that the term "dolomite," in the sense of a rock, is inexact and of many meanings because of the wide variation in magnesium carbonate content (R. 131a-132a, 174a); the use of the term both to describe a pure mineral and the rock containing the mineral (R. 123a, 130a, 292a); and particularly because Congress failed to distinguish in the statute—as pointed out by Judge Weick (A-50)—between the different grades of

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[13] The relevant comparison is between "dolomite" and "*metallurgical* or *chemical* grade limestone" and not between "dolomite" and "limestone," as the Government sometimes assumed in the District Court (R. 216a). For a discussion as to the relative specificity under the statute as between "marble" and "limestone," including "metallurgical grade limestone, chemical grade limestone," see *Riddell v. Victorville Lime Rock Co.*, 292 F. 2d 427, 434 (9 Cir. 1961); and as between "gravel" and "quartzite," see *United States v. Bonsal Co.*, 279 F. 2d 465, 467-469 (4 Cir. 1960).

dolomite, whether high grade, low grade or medium grade.

On the other hand, Dr. Kriege testified positively that in his opinion—as an able and experienced expert in the field—the terms "metallurgical and chemical grade limestone," as used in trade and commerce, were more specific than the term "dolomite" (R. 130a, 131a); and this testimony was not contradicted by the government experts, who were not even asked to express an opinion on the subject.

Yet the District Judge refused taxpayers' request (R. 423a) to embody this vital, determinative and undisputed fact in its findings of fact, but instead, approved, without any material change, the findings and conclusions as drafted and submitted by the Government, omitting any finding on this controlling issue except the unsupported, inconclusive, question-begging hedge in Conclusion of Law No. 6, referred to above.

Judge McAllister also reviewed the evidence upon this subject in his opinion, and stated his conclusions as follows (A-45-46):

> "* * * it is obvious from the record and the undisputed testimony that the term 'dolomite,' standing alone, is less specific than the term, 'metallurgical and chemical grade limestone,' and in accordance with the direction of the Conference Report above referred to, the specific provision of percentage allowance for metallurgical and chemical grade limestone prevails over the more general classification and allowance for dolomite. * * *"

Thus, the decisive findings of fact of the District Court —if they can properly be considered fact findings instead of ultimate conclusions of mixed fact or law—are not supported by the evidence, but are contrary to it; and this is shown by the careful and painstaking analysis of the facts

by Judge McAllister in his opinion in the Court below (A-11-39). See in particular Judge McAllister's conclusion on this subject (A-47) where he said:

> "In the light of the foregoing, it does not appear that this cause is to be resolved upon any issue of disputed fact or evidence with respect to the meaning of limestone or dolomite; but even if such were the case, then, in the language of Mr. Justice Story in *Two Hundred Chests of Tea, Smith, Claimant,* supra [9 Wheat. 430, 438], the weight of the evidence would be so strong that no court of justice would feel itself authorized to hold against the taxpayers on any such factual question that might be considered to be here presented."

BASIS FOR JURISDICTION OF THE DISTRICT COURT.

The basis for federal jurisdiction in the court of first instance—the United States District Court, for the Northern District of Ohio, Western Division—is that the cases are civil actions against the United States for the recovery of internal-revenue taxes under the provisions of Section 1346(a) of Title 28 of the United States Code, as amended.

REASONS FOR ALLOWANCE OF THE WRIT AND ARGUMENT.

The Court of Appeals by a divided court has decided an important question of federal law which has not been, but should be, settled by this Court—namely, the construction that should be given to a federal taxing statute (65 Stat. 497; 26 U. S. C. 114 (b)(4)(A), 1952 ed.) relating to percentage depletion of nonmetallic minerals, which has been productive of extensive, nationwide litigation, much of which is still pending (A-30).

In deciding this question, the majority of the Court below has not followed but has departed from applicable and controlling decisions of this Court in construing federal taxing statutes, *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 93-94 (1934), and in applying the "clearly erroneous" rule embodied in Rule 52(a) of the Federal Rules of Civil Procedure, *United States v. Gypsum Co.*, 333 U. S. 364, 395 (1948), and other like decisions of this Court hereinafter cited and considered; and hence the judgments below are in conflict with the applicable rules of principles of law established by this Court.

The opinion of Judge McAllister of the Court below (A-10-47), while the principal opinion, is in reality a dissent from the views of the majority, follows and applies the law as heretofore announced by this Court, and construes the statute as contended for by these petitioners. It is an analytical and complete opinion, contrasting with the opinion of Chief Judge Miller, concurred in by Judge Weick on the main issue,[14] which merely concludes, without an analysis of the statute or the evidence, that the "findings" of the District Court are not clearly erroneous. In so deciding these cases, the majority has so far departed from the accepted and usual course of judicial proceedings as to call for this Court's power of supervision.

Earlier in this petition, *supra*, pp. 9-17, it has been pointed out that the majority of the Court misapplied the law in basing decision on "findings of fact" of the District Court which, so far as they dealt with critical and determinative matters, were not supported by the evidence, and in any event, were ultimate conclusions not binding upon the Court of Appeals under the principle of Rule 52(a),

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[14] The issue as to the No. 63 Limestone, discussed in all three opinions, is a minor one in these cases, and is not considered herein. However, the Court below also divided on that issue.

Federal Rules Civil Procedure upon this review. *Helvering v. Tex-Penn*, 300 U. S. 481, 491 (1937); *Duquesne Club v. Bell*, 127 F. 2d 363, 365 (3 Cir. 1942), cert. denied 317 U. S. 638 (1942), rehear. denied 317 U. S. 706 (1942).

The majority of the Court could not avoid construing the statute in reaching decision upon the record—a legal question which necessarily had to be resolved in these cases as a basis for proper decision. The majority erred in attempting to by-pass this critical legal question and in seeking to reach decision on the basis of fact findings which were unsupported and mislabeled as "findings of fact." *Cordovan Associates, Inc. v. Dayton Rubber Co.*, 290 F. 2d 858, 860 (6 Cir. 1961); *Bogardus v. Commissioner*, 302 U. S. 34, 38-39 (1937); *Baumgartner v. United States*, 322 U. S. 665, 670-671 (1944).

Not only was there a sharp division of views in the Court below with respect to the application and meaning of this important federal taxing statute, but the issue is persistent and recurring in important litigation about the nation and a contrariety of views has been expressed by the courts as to the meaning and scope of the statute.[15] This situation both from the standpoint of numerous tax-

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[15] See, for example, *United States v. Wagner Quarries Co.*, 260 F. 2d 907 (6 Cir. 1958), affirming *Wagner Quarries Co. v. United States*, 154 F. Supp. 655 (D. C. N. D. Ohio 1957); *Blue Ridge Stone Corp. v. United States*, 170 F. Supp. 569 (W. D. Va. 1959); *Halquist v. Commissioner*, 33 T. C. 304 (1959), rev. on another ground 291 F. 2d 49 (7 Cir. 1961); *Virginian Limestone Corp. v. Commissioner*, 26 T. C. 553 (1956); *Vulcan Materials Co. v. Ernest J. Sauber, et al.*, F. 2d (7 Cir. 1962); *H. Frazier Co., Inc. v. United States*, 302 F. 2d 521 (Ct. Cl. 1962); *Riddell, Dist. Dir. v. Victorville Lime Rock Co.*, 292 F. 2d 427 (9 Cir. 1961); *Lehigh Portland Cement Co. v. United States*, 198 F. Supp. 877 (E. D. Pa. 1961)—and compare *United States v. Bonsal Co.*, 279 F. 2d 465 (4 Cir. 1960), affirming *Bonsal v. United States*, 171 F. Supp. 278 (W. D. N. C. 1959) with *South Jersey Sand Co. v. Commissioner*, 267 F. 2d 591 (3 Cir. 1959), affirming 30 T. C. 360 (1958).

payers with claims pending before the Internal Revenue Service or in the courts, and of the Government in the administration of the statute, as well as a party to litigation, calls for the granting of the writ and a review and settlement of the issue by this Court. *Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U. S. 448, 449 (1957); *Cammarano v. United States*, 358 U. S. 498, 500 (1959); *C. I. R. v. Lo Bue*, 351 U. S. 243, 246 (1956); *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U. S. 231, 232 (1959).

Another section of this same statute, involving the definition of "mining" had been involved in a plethora of litigation, until this Court allowed a writ at the request of the Government, and in *United States v. Cannelton Sewer Pipe Co.*, 364 U. S. 76 (1960), settled the issue. In the course of the opinion, page 81, *et seq.*, this Court traced the legislative history of the statute and stated the nature and reason of mineral depletion for tax purposes as follows:

> "In summary, mineral depletion for tax purposes is an allowance from income for the exhaustion of capital assets. * * * In addition, it is based upon the belief that its allowance encourages extensive exploration and increasing discoveries of additional minerals to the benefit of the economy and strength of the Nation * * *."

A study of the history of the mineral depletion statutes clearly supports this statement and particularly the direct relationship between the extension of depletion to non-metallic minerals and the existence or threat of war. The Amendment now considered was adopted in the backdrop of the Korean War. The chief object was to promote national security. Witnesses before the Committees of Congress, and especially Dr. Landes, stressed the importance of limestone—whether high calcium or dolomitic—of

metallurgical or chemical grade in the defense effort. Approximately one-half ton of limestone—*either* dolomite or high calcium stone—is required for every ton of steel produced (R. 341a) and limestone of metallurgical grade—dolomite or high calcium—is just as essential as iron ore in the making of steel (R. 347a). Indeed, there is a recent trend toward a greater use and preference by steel companies for dolomitic limestone over high calcium limestone as a flux in blast furnaces because of its lower melting point and hence greater efficiency (R. 137a, 172a, 179a), and see *Wagner Quarries Co. v. United States*, 154 F. Supp. 655, 661. Only dolomitic limestone may be used for the building or repair of open hearth furnace linings and bottoms (R. 343a).

The Senate Finance Committee stated:

> "* * * Your Committee recognizes that critical shortages have developed in certain limited areas which would justify the further extension of these provisions. This is particularly true with respect to * * * metallurgical grade limestone and chemical grade limestone deposits. * * * metallurgical and chemical grade limestones are a necessity for the steel and chemical industries, which are crucial to defense." S. Rep. No. 781, 82d Cong., 1st Sess., 79, Sept. 18, 1951, 2 U. S. Code, Cong. and Adm'n Serv., 2052.

And the legislative history at no time attempts to distinguish—in stressing the importance to national defense of metallurgical and chemical grade limestone—between limestone of high calcium content and dolomitic limestone. Both, when of metallurgical or chemical grade, were and are equally scarce and exhaustible in nature, and both were and are equally essential in the production of steel, lime and chemicals. There is no evidence that the Committees or the Congress, or any witness appearing before

them, disagreed with the principal committee witness, Dr. Landes, on this subject.

True, neither the Senate Report nor the Amendment as enacted specifically and separately mentioned "metallurgical grade *dolomite*, chemical grade *dolomite*," but there was no reason or need to do so—it would have been a redundancy—because the evidence before the Committees and the common understanding in industry as shown by the evidence below and the definitions of "dolomite" contained in standard dictionaries and works of reference, as well as by the use of the term by the Commissioner of Internal Revenue and other government departments, *supra*, pp. 11-13, clearly demonstrated that the term was uniformly defined as a "limestone" and was included and treated under the broader term "limestone"; and hence the terms user by Congress "metallurgical grade limestone, chemical grade limestone" were intended to and did embrace "metallurgical grade dolomite, chemical grade dolomite" to the same extent as if the word "dolomite" had been included along with "limestone" in this third-category mineral classification.[16]

Judge McAllister in his opinion in the Court below stated his interpretation of the statute as follows (A-45):

> "* * * Congress intended that in the statute, the term limestone should include dolomite, and that limestone of a metallurgical or chemical grade should be considered equivalent to dolomite of a metallurgical and chemical grade, a conclusion furthermore supported by the definitions of dolomite contained in the many standard works of reference, including the most gen-

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[16] See *U. S. Gypsum Co. v. United States*, 253 F. 2d 738, 743, 744 (7 Cir. 1958) where the term "stone" used in this same statute was held to include "gypsum" for depletion purposes, even though the term "gypsum" is not mentioned in the statute in any mineral classification.

erally recognized and accepted encyclopedias and dictionaries, as well as numerous other authorities on the subject."

Furthermore, the Congress intended to establish *equality* of treatment as to depletion for mineral deposits in competition for like uses and applications. H. Rep. No. 586, June 18, 1951, 82d Cong., 1st Sess., 29-30, 2 U. S. Code, Cong. & Adm'n. Serv., 1810-1811. Thus, there is no basis in the legislative history, or in reason or logic, for the view that Congress intended to discriminate in the allowance of percentage depletion between limestones—whether high calcium or dolomite—if they competed with each other—as the evidence showed they did—for use in metallurgical or chemical applications. Indeed, the legislative history cited indicates that the contrary is true.

Since the statute is concededly ambiguous [17] in the listing of mineral deposits, *supra*, p. 3, the legislative history is of great weight in a proper construction of the statute—what Congress intended to embrace by the terms "dolomite," "calcium carbonates," "metallurgical grade limestone, chemical grade limestone" and the like. *Helvering v. Stockholms Enskilda Bank*, 293 U. S. 84, 93-94, (1934), *United States v. American Trucking Ass'ns., Inc*, 310 U. S. 534, 542-545 (1940), and a host of other like decisions of this Court, hold that the legislative history, particularly when the statutory language is ambiguous, may be looked to for guidance in discovering the Congressional intent. The pertinent legislative history is cited in the Appendix (A-5-7).

Nor may the word "dolomite" be lifted out of its con-

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[17] The District Court pointed out the ambiguity in the statute, *Erie Stone Co. v. United States*, 181 F. Supp. 942, 944 (D. C. N. D. Ohio 1960) (R. 376a-377a), as did Judge McAllister in his opinion in the court below (A-13-15).

text in the statute in construing the language. All parts of the statute—all three classifications of mineral terms—must be considered together and in relation to each other, and in the light of the purpose and over-all objective of the Congress. *Mastro Plastics Corp., et al. v. National Labor Relations Board*, 350 U. S. 270, 285 (1956); *Helvering v. Stockholms Enskilda Bank, supra;* and the construction must not lead to an unreasonable or absurd result. *Ozawa v. United States*, 260 U. S. 178, 194 (1922); *Haggar Co. v. Helvering*, 308 U. S. 389, 394 (1940).

Finally, the Congress, realizing that the statute contained overlapping mineral terms and was in that respect ambiguous, enjoined in the legislative history, *supra*, p. 9, that the specific term of the statute—if it most aptly designated the mineral deposit in question—should prevail over the general in making the depletion allowance. This principle of statutory construction has many times been recognized and applied by this Court. See, for example, *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208 (1932).

The majority of the Court below erred in not construing the statute in the light of the foregoing principles and decisions of this Court, and in attempting to dispose of the case under Rule 52(a) of the Federal Rules of Civil Procedure where the state of the record plainly did not call for or justify decision on that basis. The opinion of Judge McAllister, on the contrary, adequately and properly analyzed the issues and the evidence, and correctly construed the statute in accordance with the intent and purpose of the Congress, and reached the following conclusion (A-44-45):

> "It appears, then, that one of the principal purposes of Congress in enacting this legislation, was to extend percentage depletion allowances to additional

minerals, including metallurgical and chemical grade limestone, as an incentive for the opening up of new deposits and for the energetic development of existing properties. It would seem unreasonable to hold that Congress intended to discriminate between different metallurgical and chemical grade stone and to allow 15% depletion for metallurgical and chemical grade limestone, but only 10% depletion for metallurgical and chemical grade dolomite, in view of the fact that the expert, Dr. Landes, upon whom Congress relied in the formulation of the statutory provisions according to the statement of the government in the *Wagner Quarries* case *supra*, informed Congress that *in industry*, limestone was used as a term for both limestone and dolomite."

Finally, to illustrate the confusion introduced into the law by the decision of the Court below and the distortion of Congressional intent, let us take this example: that Court would allow the same rate of depletion, namely, 10%, to all dolomite regardless of its scarcity, quality or use. A low grade dolomite, abundant in nature but with a large percentage of impurities, and hence suitable only for physical uses such, for example, as paving of parking lots and private driveways, secondary roads and for berm material (R. 92a-94a) would, according to the Court below, take under the statute the *same* rate of depletion as high grade, scarce and exhaustible dolomite, free from impurities, and suitable for metallurgical and chemical applications vital to national defense and security.

Surely that was not the intent of Congress, nor does the language used by the Congress compel or suggest that result. Indeed, a common sense, reasonable, and non-discriminatory construction of the statute would dictate that Congress intended that scarce, high grade dolomite or dolomitic limestone—as well as scarce, high grade calcium limestone—if suitable for metallurgical or chemical pur-

poses, should take a 15% rate of depletion; whereas, dolomites, as well as other limestones, containing too much impurity to qualify for metallurgical or chemical uses, should take a 10% rate. Such a construction not only makes sense, but is consistent with the statutory language, and carries out a reasonable Congressional intent and purpose in enacting the Amendment. It accords, too, with the legislative history.

The judgments below necessarily involve a construction of the statute inconsistent with the intent and objective of the Congress in enacting it, and hence are erroneous.

CONCLUSION.

It is submitted that the writ should be allowed and that this Court should construe the statute and settle the law for the guidance of the lower courts, taxpayers and the Internal Revenue Service in dealing with this unsettled and much litigated problem.

Respectfully submitted,

Ross W. Shumaker,
811 Madison Avenue,
Toledo 2, Ohio,
Attorney for Petitioners.

John J. Kendrick,
Carl V. Bruggeman,
Shumaker, Loop & Kendrick,
811 Madison Avenue,
Toledo 2, Ohio,
Of Counsel.

APPENDIX A.

Statutes Involved.

(26 U. S. C. 23(m) and 114 (b)(4)(A) 1952 ed.)

"Sec. 23. DEDUCTIONS FROM GROSS INCOME.

"In computing net income there shall be allowed as deductions

* * * * *

"(m) Depletion.—In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * *

"For percentage depletion allowable under this subsection, see section 114(b), (3) and (4).

* * * * *

"Sec. 114. BASIS FOR DEPRECIATION AND DEPLETION.

* * * * *

"(b) Basis for Depletion

* * * * *

"(4) Percentage Depletion for Coal and Metal Mines and for Certain Other Mines and Natural Mineral Deposits.

"(A) In General.—The allowance for depletion under section 23(m) in the case of the following mines and other natural deposits shall be—

"(i) in the case of sand, gravel, slate, stone (including pumice and scoria), brick and tile clay, shale, oyster shell, clam shell, granite, marble, sodium chloride, and, if from brine wells, calcium chloride, magnesium chloride and bromine, 5 per centum,

"(ii) in the case of coal, asbestos, brucite, dolomite, magnesite, perlite, wollastonite, calcium carbonates, and magnesium carbonates, 10 per centum,

"(iii) in the case of metal mines, aplite, bauxite, fluorspar, flake graphite, vermiculite, beryl, garnet, feldspar, mica, talc (including pyrophyllite), lepidolite, spodumene, barite, ball clay, sagger clay, china clay, phosphate rock, rock asphalt, trona, bentonite, gilsonite, thenardite, borax, fuller's earth, tripoli, refractory and fire clay, quartzite, diatomaceous earth, metallurgical grade limestone, chemical grade limestone, and potash, 15 per centum, and

"(iv) in the case of sulfur, 23 per centum,

of the gross income from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect to the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance under section 23(m) be less than it would be if computed without reference to this paragraph."

APPENDIX B.

Regulations Involved.

(Reg. 118, Sec. 39.23(m)-5, 1960-2, C. B. 458-460.)

"PARAGRAPH 1. Paragraph (b) of § 39.23(m)-5 is amended—

"(A) By striking that part of the first sentence which precedes the colon and inserting in lieu thereof the following:

> "For the purpose of identifying the minerals listed in paragraph (a), such minerals shall be given their commonly understood commercial meanings. If a mineral of a taxpayer is within both a specific and a general mineral classification listed in paragraph (a), such mineral shall be considered to fall within the more specific classification. If the name of a mineral listed in paragraph (a) has no commonly understood commercial meaning but the name implies a particular use or uses, such mineral is to be defined in terms of such use or uses. Certain of the minerals listed in paragraph (a) are defined below in accordance with the foregoing criteria set forth in this paragraph.

"(B) By striking the term 'Calcium carbonates' and the definition of such term and inserting in lieu thereof the following:

> "Calcium carbonates—Miscellaneous limestones and other calcium carbonate rocks (not specifically provided for at a 5 percent or 15 percent rate of percentage allowance) which are used or sold for use for purposes for which the calcium carbonate content is a major requirement. For example, the term 'calcium carbonates' includes limestone which is not of chemi-

cal or metallurgical grade and which is used or sold for use for cement manufacture or soil treatment. However, the term 'calcium carbonates' does not include any carbonate mineral which is identifiable as dolomite, marble, stone, oyster shells, or clam shells within the commonly understood commercial meaning of those terms.

"(C) By inserting immediately after the term 'Clay, brick and tile' and the definition of such term the following:

"Clay, refractory, and fire—Clay which has a pyrometric cone equivalent of 19 or higher.

"(D) By striking the terms 'Limestone, chemical grade' and 'Limestone, metallurgical grade' and the definitions of such terms and inserting in lieu thereof the following:

"Dolomite—Any carbonate rock which contains substantial amounts of the mineral dolomite and which is considered to be dolomite within the commonly understood commercial meaning of the term.

"Limestone, chemical, and metallurgical grade—Limestone which contains a calcium carbonate and magnesium carbonate content totaling 95 percent or higher by weight. For this purpose, the term 'limestone' does not include any carbonate mineral which is identifiable as a mineral falling within a more specific classification such as dolomite, marble, oyster shells, or clam shells.

"(E) By inserting immediately after the term 'Pumice' and the definition of such term the following:

"Quartzite—Metamorphosed or silica-cemented sandstone which is so firmly cemented that it has the

characteristic of breaking across rather than around the original sand grains. The term 'quartzite' is not applicable to any mineral which constitutes sand or gravel within the commonly understood commercial meaning of those terms.

"(F) By striking the term 'Stone' and the definition of such term and inserting in lieu thereof the following:

"Stone.—Common dimension, crushed or broken stone within the ordinary meaning of these terms. However, the term 'stone' does not include any mineral which is identifiable as a mineral falling within a more specific classification such as dolomite, quartzite, or chemical or metallurgical grade limestone."

Approved November 29, 1960

APPENDIX C.

Index of References to Legislative History 1951 Amendment of Revenue Act of 1939, Percentage Depletion.

COMMITTEE REPORTS.

1. *House Report* No. 586, June 18, 1951 (to accompany H. R. 4473),
   82nd Cong., 1st Sess., 1951.
   Cum. Bull., 1951-2, p. 357 at pp. 378-379, 406, 439;
   2 U. S. Code, Cong. and Adm. Serv., p. 1781 at pp. 1810-1811, 1851, 1901-1902, 1941.

2. *Senate Report* No. 781, Sept. 18, 1951 (to accompany H. R. 4473),
   82nd Cong., 1st Sess., 1951.

Cum. Bull., 1951-2, p. 458, at pp. 484-485, 514, 570, 611-612;
2 U. S. Code, Cong. and Adm. Serv., p. 1969, at pp. 2006-2008, 2052-2053.

3. *Conference Report* No. 1213, p. 77, 82nd Cong., 1st Sess., 1951.

Cum. Bull., 1951-2, p. 622, at pp. 629-630, 646;
2 U. S. Code, Cong. and Adm. Serv., p. 2121, at pp. 2132-2133, 2158.

COMMITTEE HEARINGS.

1. *Ways and Means Com.*, H. Rep., 81st Cong., 2nd Sess., Feb. 9, 1950.

Prof. Kenneth K. Landes, Head Dept. of Geology, Univ. of Mich., Ann Arbor, pp. 335-348.
Ralph L. Dickey, Pres. Kelley Island Lime & Transport Co., Cleveland, Ohio, pp. 332-335.
Russell Rarey, Pres. Marble Cliffs Quarries Co., Columbus, Ohio, pp. 480-490.

2. *Ways and Means Com.*, H. Rep., 82nd Cong., 1st Sess., Mar. 5, 1951.

Prof. Landes' Memorandum, "Metallurgical Limestone Reserves in the United States," pp. 1555-1566.
Philip L. Corson, Pres. G. & W. H. Corson, Inc., Plymouth Meeting, Pa., pp. 1566-1570.
Ralph L. Dickey, Pres. Kelley Island Lime and Transport Co., Cleveland, Ohio, pp. 1553-1555.
Russell Rarey, Pres. Marble Cliffs Quarries Co., Columbus, Ohio, pp. 1631-1635.

3. *Finance Com.*, U. S. Sen.,
82nd Cong., 1st Sess., on H. R. 4473.

Prof. Landes' Memorandum, "Metallurgical Limestone Reserves in the United States," July 12, 1951, pp. 875-884.

Philip L. Corson, Pres. G. & W. H. Corson, Inc., Plymouth Meeting, Pa., July 27, 1951, pp. 1815-1818.

Ralph L. Dickey, Pres. Kelley Island Lime & Transport Co., Cleveland, Ohio, July 12, 1961, pp. 872-884.

Russell Rarey, Pres. Marble Cliffs Quarries Co., Columbus, Ohio, July 13, 1951, pp. 891-895.

FLOOR DISCUSSION.

1. 97 Cong. Rec., pp. 7052-7060, June 21, 1951,
Statement of Robert L. Doughton, Chairman of Ways and Means Com., H. of Rep.,
2 U. S. Code, Cong. and Adm. Serv., p. 1947.

2. 97 Cong. Rec., pp. 11871-11878, Sept. 19, 1951,
Statement of Walter F. George, Chairman of Sen. Fin. Com.,
2 U. S. Code, Cong. and Adm. Serv., pp. 2099, 2115, 2119, 2120.

3. 97 Cong. Rec., pp. 13700-13705, Oct. 18, 1951,
Statement of Walter F. George, Chairman of Sen. Fin. Com.,
2 U. S. Code, Cong. and Adm. Serv., pp. 2171, 2173.

4. 97 Cong. Rec., pp. 11697, 12350, Sept. 21, 28, 1951,
Statement of Senator Kenneth McKellar with respect to the addition to the bill of Calcium and Magnesium Carbonates.

APPENDIX D.

Judgments Below.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

No. 14,402.

THE ERIE STONE COMPANY;
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

(Filed June 4, 1962)

BEFORE: MILLER, Chief Judge, MCALLISTER and WEICK, Circuit Judges.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part, and reversed in part, and that the case be remanded for entry of judgment entitling taxpayers to a 10% depletion allowance on their dolomitic products, and a 10% depletion allowance on the No. 63 limestone.

Approved for entry:

/s/ THOMAS F. MCALLISTER
United States Circuit Judge.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT.

No. 14,403.

TOLEDO STONE & GLASS SAND COMPANY,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

(Filed June 4, 1962)

BEFORE: MILLER, *Chief Judge*, MCALLISTER and WEICK, Circuit Judges.

APPEAL from the United States District Court for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed in part, and reversed in part, and that the case be remanded for entry of judgment entitling taxpayers to a 10% depletion allowance on their dolomitic products, and a 10% depletion allowance on the No. 63 limestone.

Approved for entry:

/s/ THOMAS F. MCALLISTER
United States Circuit Judge.

APPENDIX E.

Opinions Below.

Nos. 14402-14403

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE ERIE STONE COMPANY,
Plaintiff-Appellant.
v. No. 14402
UNITED STATES OF AMERICA,
Defendant-Appellee.

TOLEDO STONE & GLASS SAND COMPANY,
Plaintiff-Appellant,
v. No. 14403
UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL from the Judgments of the United States District Court, for the Northern District of Ohio, Western Division.

Decided June 4, 1962.

Before: MILLER, Chief Judge, MCALLISTER and WEICK, Circuit Judges.

MCALLISTER, Circuit Judge. These consolidated cases, involving federal income and excess profits taxes, are concerned with depletion allowances and depend upon the meaning to be given certain kinds of sedimentary rock as set forth in the tax laws.

In these cases, the writer of this opinion is of the view that certain rock herein described as dolomite, or as dolomitic limestone of metallurgical and chemical grade, is entitled to a depletion allowance of 15% as "limestone of metallurgical and chemical grade," and that the so-called "No. 63 limestone" is entitled to a statutory depletion allowance of 10% as a calcium and magnesium carbonate.

Judge Miller is of the opinion that the dolomitic limestone, or dolomite in this case, is entitled only to a 10% depletion allowance as "dolomite"; and that the "No. 63 limestone" is entitled to only a 5% depletion allowance as "stone."

Judge Weick is of the view that the dolomitic limestone, or dolomite, is entitled to a depletion allowance of 10% as dolomite, and that the "No. 63 limestone" is entitled to a depletion allowance of 10% as "dolomite." Judge Weick, therefore, agrees with Judge Miller on the depletion allowance to be given the dolomitic limestone, or dolomite; but he agrees with the writer of this opinion that the "No. 63 limestone" is entitled to a depletion allowance of 10%, not as a calcium and magnesium carbonate, however, but as "dolomite."

The result of the majority views, as variously expressed in the three opinions, is to affirm the judgment of the district court in holding that the dolomitic limestone, or dolomite in this case, is entitled to a depletion allowance of 10% as a "dolomite"; but to reverse the judgment of the district court that the "No. 63 limestone" is entitled to a depletion allowance of 5% as "stone" rather than a depletion allowance of 10%.

The facts of the case are as follows: The taxpayers operated three stone quarries and processing plants. They claimed they were entitled to 15% statutory depletion allowance on the gross income from certain of their rock product on the ground that the product was limestone of metallurgical or chemical grade, and that a certain "No. 63 limestone" should receive a 10% depletion allowance as calcium carbonate or magnesium carbonate.

The government contends that, with the exception of the "No. 63 limestone," the taxpayers were entitled only to 10% depletion allowance, on the theory that their prod-

uct was dolomite but not metallurgical or chemical grade limestone. As to the "No. 63 limestone," the government claimed that taxpayers were entitled only to a 5% depletion allowance, as "stone."

The District Court concurred in the view of the government, and held that the "No. 63 limestone" was entitled to a 5% depletion allowance, as stone, and that the other rock product was dolomite, entitled to a 10% depletion allowance, and could not be considered as limestone of a metallurgical or chemical grade, entitled to a 15% depletion allowance.

The question is whether certain of taxpayers' products was properly classified as limestone of a metallurgical or chemical grade entitled to a 15% depletion allowance; and whether the balance of taxpayers' product, known as "No. 63 limestone," was entitled to a 10% depletion allowance, as calcium carbonate or magnesium carbonate, rather than a 5% depletion allowance as "stone," within the intendment of the statute.

The statute in effect at the critical period [1] provided that the depletion allowance should be—

> "(i) in the case of * * * stone * * * 5 per centum,
>
> "(ii) in the case of * * * dolomite * * * 10 per centum,
>
> "(iii) in the case of * * * metallurgical grade limestone, chemical grade limestone * * * 15 per centum, * * *."

Taxpayers submit that their deposits were "admittedly a very high-grade kind of limestone known as the rock dolomite, or dolomitic limestone," but they say that these

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[1] Title 26 U. S. C. A. Section 23(m) and Section 114(b)(4)(A)(i)(ii)(iii) Internal Revenue Code of 1939, as amended.

deposits are not to be classified as dolomite under the above-quoted provision (ii) of the statute, because such a high-quality dolomitic limestone, having a high carbonate content and a very low percentage of impurities, is suitable for metallurgical or chemical purposes, and should be classified as metallurgical grade limestone and chemical grade limestone, under provision (iii) of the above-quoted statute. In other words, they submit that while their product is "dolomite," it is not limited to the 10% allowance, but is entitled to the 15% allowance because it is a dolomite or dolomitic limestone suitable for metallurgical and chemical purposes.

In its decision in this case, the trial court observed that Congress had devised the Act "so as to make it understandable, but that still leaves the problem up to the courts, where they have made three different classifications and used certain words and certain terms, and those words and those terms overlap, and they leave it up to the courts, then, to determine what they meant."

Much of the testimony in this case revolves about the question of what dolomite is. Pure mineral dolomite which contains no impurities would consist of 54.27% of calcium carbonate, and 45.73% of magnesium carbonate. Such pure mineral dolomite is not a commercial item, nor is it bought or sold in commerce. It is seldom found in nature, and, then, only in the form of crystals.

We have here for consideration rock dolomite. Of the taxpayers' rock dolomite, it consists, on the average, of 54.20% of calcium carbonate, 43.40% of magnesium carbonate—a total of 97.60% of carbonates—and 2.40% of impurities. Authorities differ greatly among themselves as to what constitutes rock dolomite; but all of them agree that magnesium carbonate must be present in substantial quantities extending, according to various opinions, in a

range from 19% to 45%. Much of the conflict of opinion of witnesses is with respect as to how much magnesium carbonate must be present—together with calcium carbonate—to entitle the rock product to be termed dolomite. However, no controlling issue here arises as to whether taxpayers' product could be properly termed dolomite, for, as the trial court said, "there can be no question but that both parties agree that the product of these quarries was 'dolomite,' within the commonly accepted definition of 'dolomite.'" The point wherein the government and the taxpayers differ is whether a dolomite of metallurgical and chemical grade comes within the classification of limestone of metallurgical and chemical grade, within the intendment of the statute.

It is my view that a fair reading of the evidence, as hereafter appears, discloses that "stone" is a general term, as used in subsection (i) of the above-mentioned statute, and includes "dolomite," and limestone. "Dolomite" includes limestone; and limestone of a metallurgical and chemical grade includes dolomite of a metallurgical or chemical grade. In other words, this case is a striking instance where a statutory definition of one material overlaps and includes another material.

In support of the foregoing conclusions, I refer, first, to one of the controlling considerations in the case, the legislative history of the applicable provision of the statute, which discloses:

> (a) That the Senate Finance Committee Report which added the statutory provisions here in question, made clear that the various materials named in the statute and the depletion rates should be given their customarily understood commercial meanings;[2] and

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[2] Senate Report No. 781, 82nd Congress, 1st Session, page 38; 2 U. S. Code, Cong. and Adm'n. Service, 2006-2008, 2052-2053.

(b) That, in the Conference Report on the Statutory provision here in question, Congress recognized it had used overlapping terms to describe different materials, and laid down the rule that it was to be understood that "in any case where a mineral is specifically provided for at a stated rate of percentage allowance, that the specific provision will govern over the allowance provided (whether higher or lower) for a more general classification."[3]

It is notable that the statute nowhere mentions limestone as such. The only reference therein is to limestone of a chemical or metallurgical grade. In other words, the statute is concerned, as far as limestone goes, only with a specific kind of limestone. The distinction of classifications in the statute, therefore, is not between dolomite and limestone, but between dolomite, and limestone of a specific kind—that which is suitable for chemical or metallurgical use.

The government contends that dolomite is an entirely different kind of mineral rock than limestone; that, accordingly, dolomite and any kind of limestone are mutually exclusive rock products; that, if a rock product is a dolomite, it cannot come under the classification of a limestone, or of a limestone suitable for metallurgical or chemical use; and that dolomite, of high or low grade, must be limited to a 10% depletion allowance, regardless of whether it is suitable for metallurgical or chemical use. Taxpayers emphasize that while dolomite may be a more specific term than limestone, nevertheless, limestone of a metallurgical or chemical grade is a more specific term than dolomite.

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[3] Conference Report No. 1213 of the House and Senate on the 1951 Amendment to the 1939 Code, 82nd Congress, 1st Session, p. 77, 2 U. S. Code, Cong. and Adm'n Service, pp. 2132-2133, 2158.

What we are concerned with in this case is what the commonly understood commercial meaning of dolomite is, for it is that particular meaning that here controls, in accordance with the rule set forth in the Report of the Senate Finance Committee, on the Amendment to the Act here under discussion.[4]

Taxpayers contend that one of the commonly understood commercial meanings of dolomite is a limestone, and that, although their product was dolomite, it was a high-grade dolomite, or dolomitic limestone, suitable for metallurgical or chemical use and, therefore, came within the statutory classification of limestone of a chemical or metallurgical grade.

In keeping with the rule outlined in the Senate Finance Committee Report, it is held that the courts are not concerned with classic definitions or recondite scientific theories concerning the term "dolomite," but only with the commonly understood commercial meaning of that term. *Blue Ridge Stone Corporation v. United States,* 170 F. Supp. 569, 572 (D. C. W. D. Va.).

What, then, can be said to be the commonly understood commercial meaning of "dolomite" and is dolomite commonly understood to be limestone?

The taxpayers' product in question is officially classified as limestone in official publications and rulings, including the following:

(1) The United States Department of Agriculture, in its official publication, "Liming Soils for Better Farming," Farmers' Bulletin No. 2032, defines "dolomite" as follows:

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[4] The Senate Finance Committee, which added the provisions here in question, stated in its Report: "The names of all the various enumerated minerals are of course intended to have their commonly understood commercial meaning." See *Blue Ridge Stone Corporation v. United States*, 170 F. Supp. 569, 572 (D. C. W. D. Va.).

"Dolomite—Limestone containing magnesium carbonate in amount equivalent, or nearly so, to the calcium carbonate content of the stone. Limestone containing magnesium carbonate in lesser proportions is properly called magnesian limestone or dolomitic limestone."

(2) Dolomite, used for the production of lime was treated by the Commissioner as chemical grade limestone, entitled to a 15% rate of depletion, in Revenue Ruling 56-582 (C. B. 1956-2, p. 981).

(3) Dolomite used for flux purposes in blast furnaces was considered and treated for depletion purposes by the Commissioner as metallurgical grade limestone, entitled to a 15% rate of depletion. Revenue Ruling 55-700 (C. B. 1955-2, p. 569).

The two foregoing Revenue Rulings were promulgated at a time when the Commissioner was committed to the end-use doctrine, which was abrogated by the decision of this court in *United States v. Wagner Quarries Company*, 260 F. 2d 907. But the fact that the end-use theory was rejected by the courts does not alter the general nature of the effect of these admissions by the Commissioner that dolomite was considered as chemical and metallurgical limestone in the given instances inasmuch as the Commissioner apparently was willing to admit that dolomite is chemical grade or metallurgical grade limestone, when actually used for those purposes. This is strongly persuasive that one of the commonly understood commercial meanings of dolomite was that it was a limestone.

Moreover, since the partial abandonment by the Commissioner of the end-use test, Revenue Ruling 57-288 (C.B. 1957-1, p. 518) has been promulgated by the Commissioner, in which it is stated that any limestone rock which has a magnesium carbonate content of 35% or higher shall be designated as dolomite.

In addition, in a proposed regulation, after the end-use test was rejected by the courts, the Commissioner proposed a definition of dolomite as limestone containing a magnesium carbonate content of 35% or higher by weight.

What is "commonly understood commercial meaning"? Terms used in classification of subjects of taxation must be used in their known commercial sense, according to the general usage and known denominations of trade. See Notes on U. S. Reports, 9 Wheat. 260, 6 U. S. Law Ed., 260.

As said by Mr. Justice Story, speaking for the court in *Two Hundred Chests of Tea, Smith, Claimant*, 9 Wheat. 430, 438, Law. Ed., 6 U. S. 430, 438, where classifications of tea were involved in a revenue act:

> "If we were to advert to scientific classifications for our guide on the present occasion, it is most manifest, from the works cited at the bar, that bohea is a generic term, including under it all the black teas, and not merely a term indicating a specific kind. But it appears to us unnecessary to enter upon this inquiry, because, in our opinion, Congress must be understood to use the word in its known commercial sense. The object of the duty laws is to raise revenue, and for this purpose to class substances according to the general usage and known denominations of the trade. Whether a particular article were designated by one name or another, in the country of its origin, or whether it were a simple or mixed substance, was of no importance in the view of the legislature. It did not suppose our merchants to be naturalists, or geologists, or botanists. It applied its attention to the description of articles as they derived their appellations in our own markets, in our domestic as well as our foreign traffic. And it would have been as dangerous as useless, to attempt any other classification than

that derived from the actual business of human life. . . . It is not meant to affirm that there is no such simple and distinct tea known as bohea. All that the evidence justifies us in saying is, that this is not the common bohea of commerce. . . . In this apparent conflict of competence and credible witnesses, the only way of reconciling the testimony is to suppose that they do not speak *ad idem*; that the Boston witnesses speak to the specific nature of the particular teas in controversy, and the New York witnesses to their known commercial denomination in their actual state. In this way of considering the testimony, the conflict exhibits more a matter of apparent than real diversity of opinion. But if it be not thus reconcilable, it appears to us that the weight of the evidence is so strong that teas of this description have been long imported into our market as bohea, that no court of justice would feel itself authorized to inflict the forfeiture under the statute, under a presumed intentional violation of its provisions."

In *United States v. Breed, et al.* 24 Fed. Cas. 1222, 1223, Mr. Justice Story, sitting as Circuit Justice in the Circuit Court of the District of Massachusetts, stated:

"What, then, is meant by 'loaf sugar' in a commercial sense, by which I mean, not merely among merchants, but among buyers and sellers generally in the domestic trade? Has it any generally received uniform meaning? If it has, then, that must be presumed to be the meaning adopted by the legislature. . . . I agree to the law laid down in the case of *Two Hundred Chests of Tea*, 9 Wheat. [22 U. S.] 435. That case was as fully considered, and as deliberately weighed as any which came before the court. It was there laid down, that, in construing revenue laws, we were to consider the words, not as used in their scientific or technical sense, where things were classified according to their scientific characters and properties, but

as used in their known and common commercial sense, in the foreign and domestic trade. Laws of this sort taxed things by their common and usual denominations among the people, and not according to their denominations among naturalists, or botanists, or men of science."

As bearing on the commonly understood commercial meaning of the term, "dolomite," cross-examination of the government's two expert witnesses disclosed the following definitions in the standard dictionaries, encyclopedias, scientific works, and government bulletins:

In Webster's New World Dictionary of the American Language, College Edition, 1953, dolomite is defined as:

"A rock mainly of magnesium carbonate and calcium carbonate; *a limestone* or marble with much magnesium carbonate in it." (Italics supplied.)

In Webster's New International Dictionary of the English Language (Second Edition, 1950) Unabridged, appears the following definition:

"dolomite, n. [After Deodate de Dolomieu, French geologist.] a Mineral. A calcium magnesium carbonate, of varying proportions. (Ca, Mg) CO_3, found in rhombohedral crystals, and in extensive beds as a compact limestone, often crystalline granular, either white or clouded, . . . b Petrog. A limestone or marble rich in magnesium carbonate,—dolomitic adj."

In the Encyclopedia Britannica, 1956 Edition, dolomite is defined as follows:

"Dolomite—rock, also known as dolomitic or magnesian limestone, consists principally of the mineral dolomite, which is a carbonate of magnesium and calcium, but often contains a mixture of other substances such as calcite, quartz, carbonates and oxides of iron, argillaceous material and chert or chalcedony."

In the 1955 Book of Standards of the American Society for Testing Minerals, appear the following definitions:

"DOLOMITE.—A limestone containing in excess of 40 per cent of magnesium carbonate as the dolomite molecule.

"MAGNESIAN (DOLOMITIC) LIMESTONE—A limestone containing not less than 5 nor more than 40 per cent of magnesium carbonate."

In "A Glossary of the Mining and Mineral Industry" by Albert H. Fay, U. S. Department of the Interior, Bureau of Mines (1947) Bulletin 95, page 225, dolomite is defined as:

"1. A carbonate of calcium and magnesium. . . .

"2. A term applied to those rocks that approximate the mineral dolomite in composition. . . . Also called Magnesian limestone. . . ."

In "A Handbook of Rocks," by James Furman Kemp, 1940, the following is stated:

"Limestones with 5-15 per cent MgO are called magnesian limestones, and those near 20 per cent, dolomite limestones."

In his "Guide to the Study of Rocks," by L. E. Spock (1953), it is stated:

"Dolomitic limestones are those in which the essential mineral is dolomite rather than calcite. Rocks of intermediate composition are called magnesian limestone."

In a "Dictionary of Geological Terms" (1945), dolomite is defined as follows:

"dolomite. 1. A carbonate of calcium and magnesium, (CaMg) CO_3. 2. A term applied to those rocks that

approximate the mineral dolomite in composition. . . . Also called magnesian limestone."

In "The Stone Industries" by Oliver Bowles (1939), it is stated that "the general term 'limestone,' *as used in stone industry*, includes both pure and impure limestone, high-calcium limestone, magnesian limestone, dolomite, and crystalline forms that usually are classed as marbles." (Italics supplied.)

In Information Bulletin 7738, Bureau of Mines, U. S. Department of the Interior, March 1956—Limestone and Dolomite by Oliver Bowles, it is stated:

"The essential constituent of limestone is calcium carbonate ($CaCO_3$). If the magnesium carbonate content is small the rock is known as 'high-calcium' limestone. If 10 percent or more of magnesium carbonate is present, it is called 'magnesian' or 'dolomitic' limestone. When the content of magnesium carbonate approaches 45 percent, it is known as dolomite, which is the double carbonate of calcium and magnesium ($CaCO_3 \cdot MgCO_3$). The term 'limestone' in its broader sense includes dolomite."

The above definitions and statements of the authorities, to the effect that dolomite is a limestone, as defined in government bulletins and, also, heretofore, in various rulings by the Commissioner of Internal Revenue, as well as in dictionaries, encyclopedias, and standard works on the subject, are of considerable weight in the resolution of the two questions which are here controlling:

(a) Did Congress intend that limestone, *in its commonly understood commercial meaning*, should include dolomite?

(b) Did Congress intend that limestone of a chemical or metallurgical grade, *in its commonly understood commercial meaning*, should include dolomite of a chemical or metallurgical grade?

In its brief on appeal in this court, in *United States v. Wagner Quarries Company, supra*, the government recognized that dolomite was to be treated as a kind of limestone, and gave two examples of its use, as follows:

> "dolomite is a distinct type of limestone containing a relatively high percentage of magnesium carbonate.
>
> "Professor Landes also set up requirements for dolomite, a limestone consisting of a large percentage of magnesium carbonate."

The intent of Congress is often to be found in the legislative history of a provision of a statute under consideration by the courts. While, in the controversy before us, the terms overlap and are not defined in the statute or legislative history, the Committee Reports of the House and Senate reflect light upon the subject and contain the testimony and written reports of Dr. Kenneth K. Landes, formerly head of the Department of Geology of the University of Michigan, who appeared before the Committees of the Congress, while the Amendment here involved was under consideration, and advised Congress concerning the importance, scarcity, and nature of the metallurgical and chemical grade limestone, and the part they play in our economy and national security; and Dr. Landes' testimony and reports are of transcendent importance in this case.

It appears that Dr. Landes was a witness in a prior case, *Wagner Quarries Company v. United States*, 154 F. Supp. 655 (D. C. Ohio); and on appeal of that case to this court, the government in its brief, recognized the influence of Dr. Landes' report and testimony on Congress in the enactment of the provision of the statute here in question, in these words:

> "In view of his extensive academic and commercial experience, and the role he played before Congress at the time the statutory provision in question was en-

acted, we cannot imagine a person more qualified than Professor Landes to testify with respect to the commonly understood commercial meaning of the terms 'chemical grade limestone' and 'metallurgical grade limestone,' as used in Section 114(b)(4)(A)(iii) of the 1939 Code."

Having in mind the government's contention in the *Wagner Quarries* case that no one was more qualified than Dr. Landes to testify with respect to the commonly understood commercial meaning of the terms, "chemical grade limestone" and "metallurgical grade limestone" as used in the statutory provision here in question, and of the role he played before Congress at the time it was enacted, we come to the consideration of his report and his testimony before the Congressional committees.

It appears, in this connection, that Dr. Landes testified before the House Ways and Means Committee that high quality-metallurgical grade limestone is just as essential to the making of steel as is iron ore, and is also necessary for the making of many chemicals; that limestone is common and abundant in the United States, but that metallurgical stone constitutes only a very small part of the total of limestone rock; that it is a valuable, essential, and an exhaustible mineral resource; and that the conclusion is inescapable that metallurgical limestone is a natural resource occurring in deposits, definitely limited as to recoverable volume, and that withdrawals from a deposit of metallurgical grade limestone exhaust the value of the property. Dr. Landes also testified before the Ways and Means Committee that the largest deposits of metallurgical and chemical grade limestone in Ohio consisted of dolomite located in the north central part of the State, southeast of Toledo. In the course of his testimony, Dr. Landes submitted a paper, entitled "Met-

allurgical Limestone Reserves in the United States," which was made a part of the records of the Committee. In his report, which was duly considered by the Committee, Dr. Landes stated: "*In this report 'limestone' will be used as in industry for both limestone and dolomite* except where the latter is specifically mentioned." (Italics supplied.) He further, in his report, set up four grades of limestone suitable for metallurgical and chemical purposes, two of which describe limestone of a high calcium carbonate variety, and the other two, limestone of the high magnesian kind, sometimes referred to as dolomite. He also showed by a table in his report that dolomitic limestone, or dolomite, was useful for metallurgical purposes as a flux in a blast furnace, and for chemical purposes in making lime and other chemical products. The limestone known as dolomitic limestone was also shown to be useful for refractory purposes in furnace linings.

In the light of Dr. Landes' report and testimony before the various Congressional committees having for consideration the proposed statutory provisions in question; in view of the government's recognition that no person was more qualified than Dr. Landes to tes[illegible] with respect to the commonly understood commercial meaning of chemical grade limestone and metallurgical grade limestone, as used in the statute; and in consideration of the fact that no other authority appeared before the Congressional committees to question, contradict, or [illegible]ualify the views expressed by Dr. Landes,—in my opinion, it follows that Congress, in enacting the statutory provision in question, was guided by, and followed Dr. Landes' views as contained in his testimony and report, and intended that limestone should be considered to include dolomite, "*as in industry*,"—which is equivalent to the "customarily understood commercial meanings" of those terms; and that

metallurgical or chemical grade limestone should be considered to include dolomite, capable of metallurgical or chemical use.

From the foregoing, I conclude, in this case, that the term limestone includes dolomite; and that limestone of metallurgical and chemical grade includes dolomite of a metallurgical and chemical grade.

The remaining question is, assuming from the foregoing conclusions that "limestone" includes "dolomite" in the customarily understood commercial meaning of the terms, and that metallurgical and chemical grade limestone includes dolomite capable of metallurgical or chemical use —Was taxpayers' dolomite capable of metallurgical or chemical use?

In its opening statement on the trial of the instant case, the government agreed that the proper definition of chemical and metallurgical grade limestone was "a limestone high in total carbonates, very low in impurities, and suitable for chemical and metallurgical purposes," as set forth in a statement by this court in *United States v. Wagner Quarries Company, supra.* There is no question that taxpayers' product was high in total carbonates and very low in impurities. The government at no time contended that taxpayers' product (whether called chemical or metallurgical grade limestone or dolomite) was not suitable for metallurgical and chemical use. The government clearly submitted the case solely on the question whether a dolomite capable of metallurgical or chemical use could come within the statutory classification of a limestone capable of metallurgical or chemical use. As government counsel said in their opening statement:

> "Now, I assume that Mr. Shumaker will bring in evidence to show that this stone could be used as flux stone for metallurgical purposes. We say that doesn't

> make any difference what it could be used for. * * * Consequently, it is the government's position in this case * * * [that] the plaintiffs' stone is dolomite and therefore it is entitled to a 10% depletion allowance, completely regardless of what it may be suitable for. * * *"

Accordingly, no evidence was introduced by the government as to whether or not taxpayers' product was capable of metallurgical or chemical use. The only evidence on this question was that introduced on behalf of the taxpayers.

Dr. Herbert F. Kriege, taxpayers' expert witness, is a man of outstanding qualifications, based not only upon academic learning, but also actual experience in the limestone industry. He holds a Bachelor's and Master's degree from Ohio State University, and a Ph.D. from the same university, majoring in soils, ceramics, and mineralogy. He also has a large practical experience, having been the director, for more than thirty years, of the laboratories of The France Stone Company, one of the greatest limestone producers in northwestern Ohio. He testified that he had an intimate acquaintance with the quality of the limestone produced from the three quarries here involved, during a period of more than thirty years, and that he made chemical and physical tests from each of the quarries on many occasions. He described the product and the numerous chemical tests which he made, and told of the uses, capabilities and suitability of the rock for different purposes.

Dr. Kriege testified, without contradiction, that taxpayers' product was capable of use as a flux in blast furnaces in the process of making steel, in the production of lime, in paper making, glass manufacture, in refractories, and in soil neutralization, and that, because of its high total neutralizing power, it was especially suitable for use in correcting soil acidity. To sum up, Dr. Kriege testified

that taxpayers' product was suitable for metallurgical and chemical purposes, and also was limestone of metallurgical or chemical grade. Witnesses for the government were not even asked to testify concerning the chemical quality of taxpayers' product, or its suitability for metallurgical or chemical purposes. Therefore, the only evidence in the record on the subject of the chemical quality, and the suitability of the product for metallurgical or chemical purposes is the undisputed evidence of the chemical tests above mentioned and the undisputed testimony of Dr. Kriege, who was qualified and unimpeached, and whose testimony, accordingly should have been accepted as proof of these facts by the court. *Wright-Bernet, Inc. v. Commissioner of Internal Revenue*, 172 F. 2d 343 (C. A. 6). Unimpeached, uncontradicted testimony from a well-qualified, impartial witness cannot be disregarded by the court. Such testimony should be accepted by the fact finder in a matter in which the fact finder has no knowledge or experience upon which he could exercise an independent judgment. The District Court, in its opinion, stated that it was "not convinced that the product of taxpayers' quarries is capable of use for metallurgical or chemical purposes." The court further went on to say: "Taxpayers rely upon the opinion of Dr. Herbert F. Kriege, a capable and experienced chemist, who was of the opinion that the taxpayers' product was suitable for metallurgical or chemical purposes. * * * This was the opinion of the witness unbuttressed by actualities that assisted us in the *Wagner* case. In the *Wagner* case, we concluded from the evidence that approximately 40% of the stone mined and marketed *was sold* for metallurgical and chemical uses. *In other words, the product was so inviting as to induce the metallurgical and chemical industry to purchase it for their uses.* In the cases before us, there is no evidence that the product

of the taxpayers' quarries was inviting to the metallurgical and chemical industries. We conclude, therefore, that the product might possibly be usable for certain metallurgical or chemical purposes where economic factors may, in the opinion of the user, justify its use, but we cannot conclude that it is suitable for these purposes within the terms of the definition laid down by the Court of Appeals." The definition mentioned in the foregoing appears in *United States v. Wagner Quarries Company*, 260 F. 2d 907, 908, where this court said: "The test is not what various purposes the limestone might be used for—this is conceded, but rather whether it can be found to qualify for chemical or metallurgical purposes." In its brief in the instant case, the government says: "It should also be noted that the parties agree that the proper classification of the taxpayers' deposits does not depend upon the actual use to which the deposits were put." The fact that taxpayers did not show sales for metallurgical or chemical purposes, and did not prove that the product was so inviting as to induce the metallurgical and chemical industry to purchase it for their uses does not derogate from the force of taxpayers' evidence, as shown by the persuasive and undisputed testimony of Dr. Kriege that the product was suitable, and could qualify for metallurgical and chemical purposes.

It is my opinion that since the uncontradicted, unimpeached testimony of Dr. Kriege, a well-qualified and impartial witness, was that taxpayers' product was capable of metallurgical and chemical use—as a flux in blast furnaces in the process of making steel, in the production of lime, in paper making, glass manufacture, in refractories, and in soil neutralization because of its high total neutralizing power, in correcting soil acidity—such testimony should have been accepted by the court in a

matter in which, as the authorities express it, it had no knowledge or experience upon which it could exercise an independent judgment.

With regard to the "No. 63 limestone," Dr. Kriege testified that since it was composed of 32.20% of calcium carbonate, 26.30% of magnesium carbonate, and 36.42% of silicon dioxide, such limestone would be both a calcium carbonate and a magnesium carbonate. This testimony was uncontradicted. Under the same provision of the statute which includes the depletion allowance for dolomite, namely, subsection (ii),[5] are included calcium carbonates and magnesium carbonates entitled to a 10% depletion allowance. The District Court, in its opinion, found that the testimony in the case "was not very enlightening, but that, from the record, this product may properly be classified as 'stone' in accordance with what we believe to be the intent of Congress, for its potential use seems to be limited to that of ballast." We are of the view that the uncontradicted, impartial testimony of Dr. Kriege should have been accepted by the court, and that the "No. 63 limestone" should have been held to be a calcium carbonate and a magnesium carbonate, entitled to a 10% depletion allowance under subsection (ii) of the statutory provision here involved.

In this controversy, which is the first of a number of cases filed, embodying questions of such considerable importance to the taxpayers and to the government, we consider it proper to review, in some detail, the testimony of appellant government's expert witnesses, as it bears upon the largely factual issues before us; and we feel the special obligation so to review such testimony because of our inability to accept the government's contentions.

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[5] See footnote p. 2.

Of the two expert witnesses for the government, one was Joseph Berman, an able and experienced geologist, employed by the Natural Resources Section of the Internal Revenue Service. The other government expert witness was Dr. Edward H. Watson, Chairman of the Department of Geology of Bryn Mawr College, and, admittedly, a distinguished scholar and expert in his field.

Mr. Berman was exacting in the way in which he described and defined different rock minerals, and referred to the "loose" way in which others described and defined them. He defined dolomite as "a rock that primarily is composed of the mineral dolomite. Now, that is the *technical* terminology for dolomite." He defined limestone as a rock primarily composed of calcite. When asked on direct examination if dolomite and limestone were mutually exclusive terms, he answered:

> "Well, they are mutually exclusive in this way: If somebody says a dolomite, nobody considers it a limestone; as far as I know, nobody working in the field, because when you say 'dolomite' you specifically identify it as containing magnesium carbonate, containing a magnesium carbonate molecule *in appreciable amounts.*
>
> "When the term limestone is used in the commercial and technical sense, there is no question of what it is. *There are occasions when people will use the term very broadly, including all the carbonates, such as siderite and magnesite, and maybe even dolomite, when they don't care what the composition of the material is.*"

On cross-examination, Mr. Berman stated, in answer to a question, that dolomite is not limestone. When asked if it were not quite common to define the term dolomite rock as a limestone, he replied:

> "I have seen in print such statements, but almost uniformly where they do that, they immediately explain what they mean, that one is a dolomite, one is a limestone; *but there are occasions when they will lump them together when they have no purpose in separating them,* like stone, say."

He further stated that it was his position—as an expert—that dolomite, the rock, is not a limestone. He testified that it was probably true that he knew more about the general subject of dolomite and limestone than anyone else in Washington in the Internal Revenue Service, and that although the subject matter was peculiarly within his knowledge, the Commissioner of Internal Revenue, who had recently proposed new definitions as to limestone and dolomite, had never consulted him. He declined to say that the Commissioner of Internal Revenue was proposing to define dolomite as a limestone, although such was the fact. On this subject he testified: "I do not know what the Commissioner of Internal Revenue was trying to do." He said he had not read up on that feature before coming to Toledo to testify as an expert. "I was told that the regulations had not been formalized and approved *and there has been a great deal of argument in that respect,* and I only came here as a geologist and mineralogist, not as a representative of the Internal Revenue, as such."

Mr. Berman testified that many dolomites are marbles. It is to be noted that under the statutory provisions, marble is entitled to a depletion allowance of only 5%, whereas dolomite is entitled to 10%. He further stated that he had testified in *Blue Ridge Stone Corporation v. United States,* 170 F. Supp. 569 (D. C. Va.), in which the court had decided adversely to his views, that, at least 90% of the mineral dolomite should be present in rock before it could be rock dolomite. He was then asked whether Dr. Byron

N. Cooper, head of the Geology Department at Virginia Polytechnic Institute, had also been a witness in the same case and had disagreed with him, testifying that a rock composed of more than 50% of mineral dolomite is commonly known in the trade as dolomite. This was 40% less mineral dolomite than Mr. Berman had stated was necessary to constitute rock dolomite. Mr. Berman first stated that Dr. Cooper had not disagreed with him, but that he had rather qualified his statement. When the District Court's opinion in that case was quoted to him, in which it was stated that Dr. Cooper had so testified, Mr. Berman at first disputed it, but afterward admitted he may have forgotten and that Dr. Cooper may have so testified, and had actually disagreed with him. Much of the value of Mr. Berman's testimony suffers from inconsistencies,[6] refusals

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[6] Mr. Berman testified on cross-examination as follows:

Q. Will you answer my question as to whether the experts on this subject differ very greatly among themselves as to the percentage of magnesium carbonate that must be present before you can call a rock a dolomite?

A. It depends on what,—

Q. (Interposing) Answer my question as to whether the experts and authorities differ, please.

A. I don't know what you mean by dolomite. You want to know what my definition of,—

Q. (Interposing) You have already told us that.

A. Well, you tell me what you mean, what you say a dolomite is and I'll tell you whether the experts agree.

Q. Then you don't care to answer my question, do you?

A. Well, I can't answer it because you haven't told me what you mean by dolomite or what you are implying.

* * * * *

Q. I refer you to the United States Department of the Interior, Bureau of Mines Bulletin 95, A Glossary of the Mining and Mineral Industry by Albert H. Fay. It was printed by the United States Government Printing Office, and I call your attention to the definition of dolomite contained in that document. You would consider that rather authoritative, wouldn't you?

A. No. I wouldn't consider it authoritative. It is printed by the United States Government, but it is printed by an individual

(Continued on following page)

to give plain answers to simple questions, by his insistence that the definitions he himself uses for dolomite and limestone are the only right ones, regardless of the many definitions of other experts, as well as those found in numerous standard works, which are contrary to his—and his refusal to admit that any other experts differ from him when that fact is obvious.

In any event, from the foregoing, Mr. Berman, himself an expert witness, declared, when confronted by the adverse views of other experts, that no experts are trustworthy; that, however, sometimes people use the term limestone very broadly as including dolomite; that there

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(Continued from preceding page)

expert, or authored by an individual expert the same as any other expert, and as you know with these government publications there isn't,—

Q. (Interposing) They are not trustworthy, are they?

A. No; they are not trustworthy, like all experts.

* * * * *

Q. Are you familiar with the exhibit that has been introduced here and put out by the Department of Agriculture, Farmers' Bulletin No. 2032?

A. I don't remember. Do you mean the United States Department of Agriculture?

Q. Yes.

A. I am not familiar with that, no.

Q. Well, assuming that it contains this definition of dolomite, "Dolomite: Limestone containing magnesium carbonate in amount equivalent or nearly so to the calcium carbonate content of the stone. Limestone containing magnesium carbonate in lesser proportions may be properly called magnesian limestone or dolomitic limestone."

Do you agree with that?

A. No, I wouldn't agree with it. *This is my personal definition. I,—*

Q. (Interposing) Well, are you willing to admit now that there are many rather authoritative people who disagree with you when you say that dolomite, the rock, is not limestone?

A. No, *they don't disagree with me*, but they qualify it by saying it is a specific type, and as such they give it a broad brush and call it limestone and include a lot of things in it; as I said, stone. *I am more definite about it than most people are who work with the field.*

are occasions when dolomite and limestone are lumped together under the term limestone; and he finally disclosed his own rule of definition when he stated that, as far as regards other "quite authoritative people," who call dolomite a limestone of a specific type, "I am more definite about it than most people, who work with the field."

Dr. Edward H. Watson, the other expert witness for the government, testified that he preferred to divide the carbonate rocks into limestone, which includes those rocks predominantly made up of calcite, and the dolomites, predominantly made up of the mineral dolomite. He declared, however: "I am thoroughly conscious of the fact *that many people include dolomites in the limestones.* In fact, I feel very poorly towards some geologists because of their sloppy definitions of the terms, but many people do that. * * * I am aware of the definitions in Webster's, and how that was done by Albert Johanssen, way back and that was not modified. There are many scientific terms and aspects there that are rather poor and out of date, and there is a general tendency, I would feel, for the older works to include dolomite in the general classification of limestones; whereas more recently I feel that more modern textbooks and people in general have tried to make a distinction and to limit the term limestone to the rocks necessary in calcite and leave dolomite by itself, in a sense, as a somewhat equivalent term. * * * But I am very conscious of the usage."

When asked by government counsel to state the meaning of "dolomite," Dr. Watson replied: "Well, there again there is confusion. In *my* commercial work, I would prefer—*and I say I would prefer,* because there are many different definitions that have been brought into evidence here, but I would prefer to limit the term dolomite to a natural rock containing more than 90% of the $CaMgCO_3$

twice composition, and that means the mineral dolomite. In other words, the term dolomite just refers to the mineral dolomite which has the composition of calcium carbonate and magnesium carbonate." Later, on cross-examination, he was asked whether he did not find some confusion in connection with terms like magnesium carbonate and calcium carbonate, and he replied: "Well, those terms, I don't know what they mean, sir."

Whatever the reason for the answer of the witness on these technical matters, the fact that, on direct examination, he used the term calcium carbonate and magnesium carbonate in explaining the composition of dolomite and, then, on cross-examining he said that he did not know what the terms calcium carbonate and magnesium carbonate mean, leaves his testimony on an important aspect of the case in confusion.

Dr. Watson testified that in the industry with which he was familiar, limestone was not included in dolomite. Nevertheless, he said that he was perfectly willing to state that, in other industries, as Dr. Kriege, the chief expert witness of taxpayers had testified, limestone did include dolomite. Asked specifically whether in the definitions, as he had stated them, chemical and metallurgical trade limestone would include the term dolomite, Dr. Watson said: "I would not think so. I realize that you can say because some people do say that dolomites are a member of the limestone group in general and that metallurgical and chemical users use both of these materials, that therefore you could argue a good dolomite is a chemical grade limestone, but to me it distorts the meaning."

Dr. Watson admitted that there was a wide diversity of opinion among responsible authorities as to the amount of magnesium carbonate that must be present in a dolomite rock, before it could be called dolomite; that Dr. Byron N.

Cooper, head of the Department of Geology of Virginia Polytechnic Institute, who was considered one of the responsible authorities by Dr. Watson, differed with him on this crucial aspect of the instant case; that while some authorities would call dolomite, limestone or dolomitic limestone, Dr. Watson disapproved of such terminology because he thought "it is sloppy and the cause of a lot of our trouble * * * and that is just the point;" but that he agreed that responsible authorities defined dolomite, the rock, as a limestone. When he was informed that the Commissioner of Internal Revenue had, within the year before the trial, defined or attempted to define dolomite in terms of limestone, and had fixed the percentage of magnesium carbonate at 35, Dr. Watson declared: "I think it is deplorable, and I don't see that he has any authority to do so. You can't legislate or pronounce upon things."

Finally, on cross-examination, Dr. Watson was asked, and replied:

> Q. Doctor Watson, aside from your personal opinion how can you say, recognizing that respectable authority will say that a dolomite rock is a rock containing 22½ percent magnesium carbonate, and it runs all the way up to the ideal or perfect dolomite of 45-46 percent; how can you say it is a precise, definite concept under those conditions?
>
> A. Well, I don't like that definition you just gave. I think that is a poor idea and the cause of all our trouble here.
>
> Q. Well, you are critical of a lot of other authorities, aren't you, doctor?
>
> A. Yes, sir, oh, very critical. I try to teach my students not to believe what they read in print all the time.
>
> Q. Where are they going to learn, listening to what their professors tell them?
>
> A. No, sir, by thinking for themselves, I hope.

With regard to Dr. Landes, whose testimony and report were before Congress at the time of the enactment of the critical provisions of the statute, and concerning whom, the government in the *Wagner Quarries Co.* case, *supra*, stated that it could not imagine any person more qualified to testify with respect to the commonly understood commercial meaning of the terms, chemical and metallurgical grade limestone as used in the statute, Dr. Watson took an entirely different view from the government's prior stand. He testified that Dr. Landes was one of his friends; that he had occasion to examine the document of which Dr. Landes was the author, entitled "Miscellaneous Limestone Reserves in the United States," which was used before the Congressional committees when this legislation was being formulated; that Dr. Landes, in that comprehensive study, included the dolomites and dolomitic limestone under the general heading of "Limestone"; that he had heard of these deposits in Ohio of dolomite, or limestone of the dolomitic nature, which were well known in geology; but that he entirely disagreed with Dr. Landes in calling them the biggest reserve of limestone in that state; that Dr. Landes called the dolomite limestone, and that he, Dr. Watson, would not agree that such dolomite was limestone. Dr. Watson was then informed that before Congress had enacted the legislation here in question and the provisions of the statute containing the various terms and classifications, the Congressmen had read the paper of Dr. Landes and had questioned him at length. To this statement, Dr. Watson replied: "I can't see how Dr. Landes, whom I know, would have been responsible for those terms—I don't see how he could be responsible for them because they really don't make very much sense."

To sum up generally, then, the testimony of the government's expert witnesses, it appears that they concede that other authorities use the term, dolomite, as meaning limestone, although, in their opinion, such use of the term is sloppy, inaccurate, without exact meaning, and doesn't make much sense; that, in their opinion, dolomite means a specific substance, different from limestone; and that they disagree with the testimony and statements of Dr. Landes before the Congressional committees, in which he termed dolomite a limestone, and testified that the largest deposits of limestone, in Ohio, available for metallurgical and chemical use, consisted of certain deposits of dolomite.

We should consider, then, the admonition contained in the legislative history of the statute involved, in which the Conference Report of the House and Senate directed that "in any case where a mineral is specifically provided for at a stated rate of percentage allowance, that the specific provision will govern over the allowance provided (whether higher or lower) for a more general classification."

Which are the more specific terms, dolomite, or limestone of a metallurgical or chemical grade?

Dolomite, standing alone, may be a "high grade dolomite," a term used by the District Court in its opinion,—or a "low grade dolomite." If it is a high grade dolomite, it could be used as a fluxstone in a blast furnace in the manufacture of steel; if a low grade dolomite, it could not be used for such a purpose. Some dolomites can be used for chemical purposes; others cannot be. Moreover, dolomites are classified as: (1) argillaceous (clay) dolomite; (2) siliceous (silica) dolomite; (3) arenaceous (sandy) dolomite; and (4) cherty dolomite. Dolomites are often called magnesian limestones or dolomitic limestones.

dependent upon the magnesian carbonate content. Many dolomites are marbles, and are entitled to only a 5% depletion allowance, although a dolomite which is not a marble, is entitled to a 10% depletion allowance, according to the statute. This is an instance where marble is a more specific term than dolomite—although it is a dolomite—and because it is a more specific classification, the lower percentage allowance governs in that particular classification.

There are many different scientific opinions on how much magnesium carbonate must be present before a substance can be termed a dolomite. As an instance, one authority considers that if there is 50% of mineral dolomite present, which will amount to 22½% of magnesium carbonate, the substance is dolomite. Another authority holds that at least 90% of mineral dolomite must be present before the substance can be considered dolomite.

In its brief on appeal in *United States v. Wagner Quarries Company, supra,* the government said:

> "Actually, there is an overlap in the statute. As both Dr. Kriege and Dr. Bowles testified, the word 'stone' is broader than 'calcium carbonate' which, in turn, is broader than 'chemical grade limestone' or 'metallurgical grade limestone.' Furthermore, the expert testimony is in agreement that 'chemical grade limestone' and 'metallurgical grade limestone' connote a specific type or quality of limestone; and the District Court held that the terms or descriptions of specific mineral deposits and, as used in the statute, denote a definite type and quality of mineral, more specific than the terms 'stone' and 'calcium carbonates' also used in the statute."

It will be noted that the government's stand, in the *Wagner* case, was that the terms, chemical grade limestone and metallurgical grade limestone were more specific than

the term, calcium carbonates. In passing, it may be remarked that calcium carbonates were included in the same statutory classification as dolomite for a depletion allowance of 10%, instead of the allowance of 15% for chemical and metallurgical grade limestone.

In *United States v. W. R. Bonsal Company*, 279 F. 2d 465 (C. A. 4), it was held that while the terms sand and "quartzite" are not mutually exclusive terms, "quartzite" as used in the statute, is a more specific term than "sand," which is also used in the statute. The court said that it was not intended that a mineral fall within a general classification, when a more specific application applied. The court held:

> "When Congress was called upon to classify products of mines and quarries for depletion purposes, it relegated the meaner ones to the lower rates. Obviously, however, the intention was to allow the higher rates to materials which were rare or qualitatively adaptable to higher uses. * * * It seems plain that Congress did not intend the general term, such as 'gravel,' which, when applied to a rocky substance, is descriptive only of the size of the fragments into which it is broken, to govern rather than a more specific classification according to the nature and quality of material. * * * As we have indicated, however, Congress realized a given material might fall within more than one classification, intending the more specific to govern. We think quartzite is more specific as a classification than the general terms, which suggest no more than the size of the fragments into which the material is broken."

I am of the view that, in conformity with the foregoing, in the instant case, taxpayers' product was not only "stone" within the first category of the statute, and "dolomite" within the second classification, but it was also

"metallurgical or chemical grade limestone" within the third bracket of the statute, which was qualitatively adaptable to higher uses and, hence, entitled to the depletion allowance at the rate of 15%.

Moreover, it is to be emphasized that while none of the government witnesses testified on the subject of whether dolomite was a more specific term than metallurgical and chemical grade limestone, Dr. Kriege was uncontradicted in his testimony that, *as used in trade and commerce, chemical and metallurgical grade limestone was a more definite and specific term than dolomite.* It therefore appears that, while the term dolomite appears from the evidence to be more specific than limestone, still the term dolomite, standing alone, is a word of many meanings, and is less specific than *dolomite of a chemical or metallurgical grade, or than limestone of a chemical or metallurgical grade.*

Since, under the rule of construction of the statute to be followed in accordance with a direction of the House and Senate Conference Report heretofore mentioned, where a mineral is specifically provided for at a stated rate of percentage allowance, the specific provision will govern over the allowance provided for a more general classification, dolomite of a chemical and metallurgical grade, being equivalent to limestones of a chemical and metallurgical grade, is a more specific term than dolomite and hence would be entitled to the depletion allowance of 15% instead of the depletion allowance of 10% for dolomite.

Finally, it is to be said that, in expounding a statute, courts are not to be guided by a single sentence or part of a sentence, but must look to the provisions of the whole law, and to its object and policy. The object and purpose of amendatory provisions of the statute of 1951, here in question, were to extend the depletion allowance to metal-

lurgical and chemical grade limestone. Mineral depletion for tax purposes is based on the belief that its allowance encourages extensive exploration and increasing discoveries of additional minerals to the benefit of the economy and strength of the nation. Courts are not concerned with the validity of the theory or with the statutory policy. *United States v. Cannelton Sewer Pipe Co.*, 364 U. S. 76. Allowance for depletion has been a controversial subject for years, and officials of the executive branch have sought from time to time, with conspicuous lack of success, to persuade the Congress to eliminate some of its alleged over-generous features. But that is not the concern of the courts, whose plain duty is to apply the allowance as Congress meant it. *Dragon Cement Company v. United States*, 244 F. 2d 513 (C. A. 1).

As Dr. Landes pointed out in his statement before the Congressional committees, metallurgical stone constitutes only a very small part of limestone rock in the nation, and it is a valuable, essential, and exhaustible mineral resource. He went on to say: "Every metallurgical limestone quarry or mine today is working a deposit which has definite boundaries, whether physical or economic, or both, beyond which exploration cannot go. Many of these deposits will reach these boundaries within the next ten years. . . . Of course, new deposits will be discovered in the future as in the past, but their discovery is becoming increasingly difficult and expensive. For example, one steel company has spent $100,000 during the last three years in the search for new deposits, and it is still forced to buy over half of the needed fluxstone from other producers. The conclusion is inescapable that metallurgical limestone is a valuable, natural resource, occurring in deposits limited as to recoverable volume. Each year's withdrawal from a deposit of metallurgical grade limestone

exhausts the value of the property." Before the committees, Dr. Landes testified that the leading metallurgical stone producing states are Michigan, Pennsylvania, and Ohio, and that the biggest limestone deposits available for metallurgical or chemical use in Ohio consisted of the dolomite found in North Central Ohio.

Dr. Watson, the government witness, also recognized, whether they were called limestone or dolomite, that among the "very top deposits" in the United States for metallurgical purposes, one of the greatest reserves was the dolomite in Ohio, which was "pretty high grade dolomite" and that limestone or dolomite or dolomitic limestone were very useful in connection with the production of steel. In keeping with the pronouncement of the Supreme Court in *United States v. Cannelton Sewer Pipe Co.*, supra, the depletion for metallurgical and chemical grade stone, whether called limestone or dolomite, must have been based on the belief of Congress that its allowance would encourage exploration and increasing discoveries of additional metallurgical and chemical grade stone, which is so essential to the making of steel and other products, and to the benefit of the economy and strength of the nation. Certainly, it requires no discussion to demonstrate that steel itself is of transcendent importance to the security and, even, survival of our nation in these crucial times, and that, as Dr. Landes, in his statement before the Congressional committees, said, metallurgical grade limestone is just as essential to the making of steel as is iron ore.

It appears, then, that one of the principal purposes of Congress in enacting this legislation, was to extend percentage depletion allowances to additional minerals, including metallurgical and chemical grade limestone, as an incentive for the opening up of new deposits and for the

energetic development of existing properties. It would seem unreasonable to hold that Congress intended to discriminate between different metallurgical and chemical grade stone and to allow 15% depletion for metallurgical and chemical grade limestone, but only 10% depletion for metallurgical and chemical grade dolomite, in view of the fact that the expert, Dr. Landes, upon whom Congress relied in the formulation of the statutory provisions according to the statement of the government in the *Wagner Quarries* case, *supra*, informed Congress that, *in industry*, limestone was used as a term for both limestone and dolomite.

It is the opinion of the writer, in view of the legislative history of the statutory provisions, the objectives of the legislation, the testimony of the witnesses, and the great weight of the authorities on the technical subject in question, that Congress, in formulating the various definitions and classifications of stone entitled to different depletion allowances, was guided by the expert advice and testimony of Dr. Landes, as contended by the government in the *Wagner Quarries* case, especially since no evidence or testimony contradictory to that of Dr. Landes appears to have been at any time presented to or considered by Congress; that, consequently, Congress intended that in the statute, the term limestone should include dolomite, and that limestone of a metallurgical or chemical grade should be considered equivalent to dolomite of a metallurgical and chemical grade, a conclusion furthermore supported by the definitions of dolomite contained in the many standard works of reference, including the most generally recognized and accepted encyclopedias and dictionaries, as well as numerous other authorities on the subject.

Moreover, it is obvious from the record and the undisputed testimony that the term "dolomite," standing alone,

is less specific than the term, "metallurgical and chemical grade limestone," and in accordance with the direction of the Conference Report above referred to, the specific provision of percentage allowance for metallurgical and chemical grade limestone prevails over the more general classification and allowance for dolomite. In addition, the uncontradicted, impartial, and unquestioned testimony of Dr. Kriege, the taxpayers' expert witness, that "No. 63 limestone" was a calcium carbonate and a magnesium carbonate, which, by the statute is entitled to a depletion allowance of 10%, instead of a depletion allowance of only 5%, should have been accepted as proof of the fact in accordance with the authorities heretofore cited. *Rookwood Pottery Co. v. Commissioner of Internal Revenue*, 45 F. 2d 43 (C. C. A. 6); *Wright-Bernet v. Commissioner of Internal Revenue*, 172 F. 2d 343 (C. C. A. 6); *Roth Office Equipment Co. v. Gallagher*, 172 F. 2d 452 (C. C. A. 6); *Loesch & Green Const. Co. v. Commissioner of Int. Rev.*, 211 F. 2d 210 (C. A. 6); *Tank v. C. I. R.*, 270 F. 2d 477 (C. A. 6).

With regard to the finding of the trial court that the No. 63 stone was not dolomite, but "stone," it is to be emphasized that this finding was contrary to the uncontradicted testimony of an unusually well-qualified, expert witness, Dr. Kreige, that the No. 63 stone was a high-siliceous dolomitic limestone; and his explicit testimony on this point was that it was a calcium carbonate and a magnesium carbonate. There is no testimony or is there the implication of any testimony in the record that it was not a calcium and magnesium carbonate. Unimpeached, uncontradicted testimony from a well-qualified, impartial witness should be accepted by the court, especially when the court has no knowledge or experience on which it could exercise an independent judgment. *Wright-Bernet*

v. Commissioner of Internal Revenue, 172 F. 2d 343 (C. C. A. 6). Under the statute, calcium carbonate and magnesium carbonate are entitled to a 10% depletion allowance, instead of a 5% allowance as "stone."

In the light of the foregoing, it does not appear that this cause is to be resolved upon any issue of disputed fact or evidence with respect to the meaning of limestone or dolomite; but even if such were the case, then, in the language of Mr. Justice Story in *Two Hundred Chests of Tea, Smith, Claimant, supra*,* the weight of the evidence would be so strong that no court of justice would feel itself authorized to hold against the taxpayers on any such factual question that might be considered to be here presented.

Accordingly, it is my view that the judgments should be vacated and the cases remanded for entry of judgments entitling taxpayers to a 15% depletion allowance on their dolomitic products, and a 10% depletion allowance on the No. 63 limestone.

However, the majority views in the three opinions in this case require that the judgments of the district court be affirmed in part, and reversed in part, and that the cases be remanded for entry of judgments entitling taxpayers to a 10% depletion allowance on their dolomitic products, and a 10% depletion allowance on the No. 63 limestone.

MILLER, Chief Judge, dissenting. The evidence in this case supports the finding of the District Judge that the stone deposits quarried by the taxpayers were (with one exception) relatively uniform, sedimentary, carbonate rocks and contained a minimum of 90 per cent of the

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* Ante, pages 7, 8.

mineral dolomite. They possessed proximate chemical analyses ranging as follows:

Calcium carbonate	52-56 per cent
Magnesium carbonate	41-45 per cent
Impurities	3 per cent or less

The one exception was the so-called No. 63 stone from the Huntington quarry which possessed a proximate chemical analysis as follows:

Calcium carbonate	33.82 per cent
Magnesium carbonate	27.23 per cent
Impurities	38.25 per cent

The District Judge was of the opinion that the word "dolomite" referred to a rock rich in magnesium carbonates and composed of 90 percent or more of the mineral dolomite, and that the word "limestone" referred to a high calcium carbonate rock having a calcium carbonate content far in excess of the magnesium content and ranging up to 95 per cent. For a helpful discussion of this same question, see the opinion of the same Judge in *Wagner Quarries Co. v. United States*, 154 F. Supp. 655, 659-662. He pointed out in the present case that various authorities differed on the percentage of content of magnesium or calcium carbonates in order to arrive at a determination of whether the rock was dolomite or limestone. He found that the taxpayer's product, excepting the No. 63 stone, was a high grade "dolomite" but not "limestone" of chemical grade or metallurgical grade. In his opinion, reported at *Erie Stone Co. v. United States*, 181 F. Supp. 942, he points out why the ruling in *Wagner Quarries Co. v. United States, supra*, 154 F. Supp. 655, affirmed, 260 F. (2) 907, C. A. 6th, and relied upon by the appellants, is not controlling in this case. See also: *Riddell v. California Portland Cement Co.*, 297 F. (2) 345, 351, C. A. 9th;

Halquist v. Commissioner, 33 T. C. 304, 321-322, reversed on other grounds, 291 F. (2) 49, C. A. 7th.

The District Judge also found that the No. 63 stone from the Huntington quarry was not "dolomite" but was "stone." He stated that its potential use seemed to be limited to that of ballast and that it appeared to possess no other virtues. Dr. Kriege, appellants' expert witness, testified that the content of the rock dolomite varied widely in common usage so far as magnesium was concerned; that there was a wide diversity of opinion among the experts as to the magnesium carbonate that should be present before the rock qualified as dolomite; and that to quite an extent the use determined the definition of the stone because the users had developed their own terminology. He testified that to a person interested primarily in the use of the material for cement purposes it began to be dolomitic or a dolomite at five per cent, or ten per cent at the utmost, but that the user of the material for flux stone in blast furnaces, for example, would think in terms of nearer to forty per cent magnesium carbonate before it ever became a dolomitic limestone to him. The explanation for this was that magnesium carbonate was an impurity and a serious limitation in the making of cement, but that the magnesium carbonate content was a very definite benefit if it was used for blast furnaces. He testified as follows:

"Q. Now, doctor, I will ask you for your individual opinion as a man who has had as much experience in this subject as anybody in the United States; I want your opinion as to how much magnesium carbonate would be present in a dolomite rock or dolomitic rock in order to make it a dolomite in terms of trade and commerce? Give us your own personal views on that subject.

A. In my own personal thinking, I find difficulty in

thinking of a rock as a dolomite if it does not contain well over forty percent magnesium carbonate."

It appears to be agreed that the magnesium carbonate found in the company sample was only 27.23 per cent.

In my opinion, the findings of the District Judge are supported by the evidence, are not clearly erroneous and should be accepted on this review. *United States v. Wagner Quarries Co. supra*, 260 F. (2) 907, 908, C. A. 6th.

I would affirm the judgment of the District Court.

WEICK, Circuit Judge.

No. 63 stone which contained carbonates of 61.05 per cent was classified by the District Court, not as dolomite, but as stone and held entitled to the lowest depletion allowance of 5%. In my judgment, since this stone contained more than 50% of the mineral dolomite, it was entitled to a classification as dolomite with a 10% depletion allowance. *Blue Ridge Stone Corp. v. United States*, 170 F. Supp. 569 (D. C. Va., 1959).

The fact that the stone contained impurities of 38.25% means simply that it is a low grade dolomite. The statute does not distinguish between high and low grade dolomite. Either grade is entitled to a 10% depletion allowance.

I therefore agree with Judge McAllister that the District Court was in error in not classifying No. 63 stone as dolomite and that the judgment should be reversed with instructions to so classify it.

I am in agreement with Judge Miller that the District Court was correct in classifying taxpayers' product containing in excess of 90% of the mineral dolomite as a high grade dolomite entitled to a 10% depletion allowance and that part of the judgment of the District Court should be affirmed.

APPENDIX F.

Order Denying Petition for Rehearing.

(Cases Nos. 14,402 and 14,403—captions omitted.)

(Filed August 7, 1962.)

BEFORE MILLER, Chief Judge, MCALLISTER and WEICK, Circuit Judges.

The above cause coming on to be heard, and the court being duly advised, it is ORDERED that the petition for rehearing be, and is hereby, denied on the ground that the findings of fact of the district court that the dolomite in question is not limestone of chemical and metallurgical grade were supported by the evidence. Judge McAllister is of the opinion that the petition for rehearing should be granted on the ground that, while both parties agree that the dolomitic product is dolomite, the case should be determined on the issue whether it was the intention of Congress that dolomite of chemical and metallurgical grade should be classified in the same category for depletion purposes as limestone of chemical and metallurgical grade.

Approved for Entry:

THOMAS F. MCALLISTER,

United States Circuit Judge.

APPENDIX G.

Stipulation of Consolidation.

(Cases No. 14,402 and 14,403—captions omitted.)

(Filed November 12, 1960.)

Since the above cases involve common questions of law and fact and were consolidated for trial in the District Court, the parties by their undersigned counsel stipulate, subject to the approval of the court, that the cases in this Court on appeal may be consolidated and treated as one case for the purpose of preparing, printing and filing the briefs and appendices (record on appeal), for oral argument and other appeal purposes.

/s/ ROSS W. SHUMAKER,
Attorney for Plaintiffs-Appellants.

/s/ CHARLES K. RICE,
Attorney for Defendant-Appellee,
CHARLES K. RICE,
Assistant Attorney General.

Approved:
/s/ PAUL C. WEICK,
Circuit Judge.

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No. 82-5

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE NEW YORK TIMES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 388

THE ERIE STONE COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question in this case is whether the court below erred in holding that, for percentage depletion purposes under Section 114(b)(4)(A) of the Internal Revenue Code of 1939 (26 U.S.C. (1952 ed.) 114), certain mineral deposits of the taxpayers are "dolomite" (for which the percentage rate of depletion is ten percent) rather than "metallurgical grade limestone" or "chemical grade limestone" (for which the depletion rates are fifteen percent). Dolomite is distinguishable from other stones by its richness of magnesium carbonate content (R. 399a). It was added to the list of minerals subject to percentage depletion simultaneously with chemical and metallurgical grade limestone (as well as several other minerals), in recognition of the fact that it is a magnesium compound.

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See Section 319 of the Revenue Act of 1951, c. 521, 65 Stat. 452; S. Rep. No. 781, 82d Cong., 1st Sess., p. 38 (1951–2 Cum. Bull. 458, 485). At the same time, Congress indicated that the mineral classifications were intended to have their "commonly understood meaning" and, recognizing that there was some overlapping in the statutory mineral classifications, that the specific classification should control over the more general classification. H. Conf. Rep. No. 1213, 82nd Cong., 1st Sess., p. 77 (1951–2 Cum. Bull. 622, 630).

In the trial court, the taxpayers conceded that the deposits in issue were dolomite (see R. 375a, 377a), but contended that they should nevertheless be classified as chemical or metallurgical grade limestone. The district court concluded (1) that the evidence showed that dolomite and limestone are commercially considered to be different minerals and that the deposits involved in this case were dolomite within the commonly understood commercial meaning of the term; (2) that, even if dolomite were generally considered as a type of limestone, there was no proof that petitioner's dolomite was usable for general metallurgical and chemical purposes although it might possibly be used for certain metallurgical or chemical purposes; and (3) acceptance of the taxpayer's contention would nullify the separate statutory classification of dolomite (R. 373a–381a; 181 F. Supp. 942). The court of appeals affirmed on factual grounds, with one judge dissenting (Pet. A–10 to A–50).

We submit that there is no occasion for further review of this case. The decision below is correct; it is

in accord with the Seventh Circuit's more recent opinion in a substantially identical case, *Vulcan Materials Co. v. Sauber*, decided June 25, 1962 (10 A.F.T.R. 2d 5005); there is no conflict;[1] and the issue involved is not relevant under the 1954 Code, since Section 613 (b)(6) prescribes the same percentage rates of depletion, dependent upon the purpose for which they are sold or used, for both dolomite and limestone of all grades.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
MELVA M. GRANEY,
Attorney.

SEPTEMBER 1962.

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[1] Petitioners suggest that the decision below conflicts with *United States v. Wagner Quarries Co.*, 260 F. 2d 907 (C.A. 6). As the district court's opinion, however, shows, there is no conflict with *Wagner*. Moreover, there cannot possibly be a conflict of circuits, for both this case and *Wagner* were decided by the same district judge and affirmed by the Sixth Circuit.